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PARLIAMENT AND THE BRITISH EMPIRE

PARLIAMENT
AND THE
BRITISH EMPIRE

Some Constitutional Controversies
Concerning Imperial Legislative Jurisdiction

By

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PREFATORY NOTE

The legal right of the British Parliament to legislate on any subject for any or all parts of the British Empire is now universally recognized, but this has not always been the case. From time to time controversies have arisen within the Empire in which this right has been vehemently denied. The subtitle of this volume is intended to indicate that it is concerned with some of these disputes but is not intended as a comprehensive history of them all. It will be noticed, in particular, that it gives no account of the momentous conflict of opinion that immediately preceded the American Revolution, though the central constitutional issue involved was the question of Parliament's jurisdiction over the colonies. The reason for this omission is that the constitutional aspect of this controversy has been pretty thoroughly explored, and I do not flatter myself that I could contribute anything substantial to a better understanding of it.

Of the chapters that follow, the first has appeared in the *Cambridge Law Journal* (1928) and parts of the second and fourth in the *Political Science Quarterly* (March, 1925, and December, 1926). I have to thank the editors of these periodicals for permitting me to republish this matter. My obligations to other writers are indicated in the Notes and References; I desire to record here my indebtedness to

Miss Isadore G. Mudge, Reference Librarian of Columbia University, for invaluable bibliographical assistance.

R. L. S.

COLUMBIA UNIVERSITY
April, 1929

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Chapter I

A RETROSPECT AND A THEORY

A few years ago a distinguished constitutional historian reopened what had once been a burning issue of political controversy, the question of the validity of the authority claimed and exercised by the British Parliament over the American colonies. There had always been a difference of opinion respecting the oppressiveness of those Acts of Parliament against which Americans protested during the years preceding the Declaration of Independence, but with regard to their legality, as determined by precedent, there had come to be a virtual consensus of historical opinion, British and American alike, that Parliament was right, and that those who denied its legal authority over the colonies were wrong. What may be called the orthodox view was thus expressed by Osgood in 1907: "British lawyers and officials at home and those who represented the home government in the colonies held that, in law if not in fact, the authority of Great Britain within the dominions was complete. . . . They held that the colonists were in principle as completely subject to parliament . . . . as were the local jurisdictions within England itself. In this they were technically correct and were quite in harmony with the principles of English law."[1] This opinion has been challenged by Professor Charles Howard McIlwain in a provocative

and historically sensational essay entitled *The American Revolution: A Constitutional Interpretation*, which received the Pulitzer Prize in History for the year 1923. The view set forth in this work is that Parliament never possessed lawful authority outside the realm of England, and that those Americans who denied its jurisdiction over the colonies were therefore right. According to Professor McIlwain, its imperial supremacy originated in a usurpation that began during the Puritan Revolution. He lays stress in this connection upon the Act establishing the Commonwealth, passed by the Long Parliament on May 19, 1649, concerning which he says not only that it was illegal, but that it was the beginning of "the direct constitutional antecedents of the American Revolution,"[2] and "apparently the first formal assertion by a Parliament of its authority beyond the realm."[3] It is proposed in this chapter to test the validity of Mr. McIlwain's thesis, to determine, if possible, whether he should be acclaimed as an Athanasius *contra mundum* or cast into outer darkness as a belated heretic. In either case we shall not be ungrateful to him for showing that the historical antecedents of constitutional relations within the British Empire deserve further consideration.

* * *

At the outset it should be said that the Commonwealth Act was undoubtedly illegal, as were all of the enactments of the Long Parliament passed after its breach with Charles I in 1642. In that year, shortly before the outbreak of the Civil War, the Lords and Commons advanced

the revolutionary claim that they had the right to enact laws without the personal approval of the King, and after he had refused his assent to a bill that would have deprived him of the control of the militia, the two Houses proceeded to pass the measure in the form of an ordinance. In a war of words that preceded the appeal to arms the legality of the Militia Ordinance was denied by the King and affirmed by Parliament, the latter asserting that the King's pleasure was exercised and declared in the High Court of Parliament "after a more eminent and obligatory manner" than it could be "by personal act or resolution of his own," and that what was agreed to in Parliament had "the stamp of the royal authority," even though His Majesty, "seduced by evil counsel," should personally oppose it.[4] This revolutionary claim did not lack support which is likely to impress the student of English constitutional history as sometimes more ingenious than ingenuous. In their efforts to find justification in precedent for radical innovations the lawyers who championed the parliamentary cause, those "ardent searchers of mouldering records" of whom Maitland speaks, undoubtedly played havoc with history. It would seem that the medieval constitution which they sought to "restore" existed in their own minds rather than in the Middle Ages.[5] Thus Prynne, in his *Soveraigne Power of Parliaments and Kingdomes*, published by order of the House of Commons in 1643, argued on historical grounds that the King in giving his assent to bills merely declared the law which the Lords and Commons had already made, and he undertook to support by precedent, as well as by

considerations of equity, reason and logic, the contention that the King was legally bound to assent to "bills of common right and justice" passed by the two Houses unless he could give such reasons for not doing so as would satisfy them.[6] The annals of the Puritan Revolution afford abundant and interesting illustration of the distortion that history always suffers when radicals resort to it for proof that they are not innovators. The theory of the parliamentarians that the personal assent of the King was not essential to the validity of legislation was stamped as political heresy at the time of the Restoration. An act of 1660 declared by implication that all the enactments of Parliament from the time of the breach with the King to the Restoration were invalid,[7] and an act of 1661 expressly held them to be null and void.[8] By the latter statute it was provided that if any person asserted "that both Houses of Parliament or either House of Parliament have or hath a Legislative Power without the King," he should incur the penalties of *praemunire*.

The statute book is a blank from 1642 to 1660. During this interval, of course, much *de facto* legislation was passed by Parliament. From March, 1642, to the close of 1648 its enactments, which had the assent of Lords and Commons, are known as "ordinances." On January 2, 1649, an ordinance for the creation of a court to try the King was rejected by the Lords, whereupon the Commons, two days later, assumed supreme power, declaring, "That whatsoever is enacted or declared for law by the Commons in Parliament assembled, hath the force of law, and all the

people of this nation are concluded thereby, although the consent and concurrence of King or House of Peers be not had thereunto." After this their enactments are known as "acts," the first to bear this title being an act of January 6, erecting a high court of justice for the trial of the King.[9]

It is customary to give the name of Parliament to the two Houses during the years of their conflict with the Crown, and not to withhold it even from that legally disreputable remnant of the House of Commons known as the Rump. But we must realize, if we would have accurate ideas about Parliament, that it has never had legal existence apart from the King. Parliament at war with the King is to an English lawyer a contradiction in terms. As Dicey reminds us, "Parliament means, in the mouth of a lawyer (though the word has often a different sense in ordinary conversation), the King, the House of Lords, and the House of Commons; these three bodies acting together may be aptly described as the 'King in Parliament' and constitute Parliament."[10] We could view the Lords and Commons, after their breach with Charles I, as a full and legal Parliament only if we were prepared to accept their revolutionary pretence that they were loyal subjects of a King against whom they were actually waging war, and that he was constructively present at their sessions and assented to their acts.[11] And with the execution of the King even this illegal fiction had to be abandoned, though the revolutionists still professed to be restorers.[12] It was during the Civil War that the conception of Parliament as an entity

distinct from the King had its origin, but this idea, though it was to be perpetuated with very important consequences for the political history of the world, was always, as Professor Pollard remarks, "a fundamental misconception of the English constitution," tending "to falsify history and to render unintelligible the actual working of the constitution of the empire."[13]

With the collapse of the royalist cause in the year 1648 the Puritan Revolution entered upon its second and undisguisably revolutionary phase. The revolutionists gave up all pretence of loyalty to Charles I, and following his execution the Rump Parliament, by a series of enactments during the first half of 1649, abolished the monarchical constitution of England, set up a republican form of government and proclaimed a new doctrine respecting the source of political authority in the empire. The word "empire" is used here in its modern and familiar sense to designate the aggregate of the communities that owed allegiance to the King of England.[14] It should be recalled that there was an English Empire, though it was not known by that name, long before the founding of oversea colonies in the seventeenth century. Ever since the Norman Conquest the English Kings had possessed dominions outside the realm of England, and though some of these — the former French possessions — had been lost before the seventeenth century, others remained under their rule. In adition to the realm of England Charles I's "empire" included Scotland, Ireland, the Channel Islands, the Isle of Man and the oversea colonies in the new world.[15]

In the Act establishing the Commonwealth, passed on May 19, 1649, it was "declared and enacted":

> That the People of England, and of all the Dominions and Territories thereunto belonging, are and shall be, and are hereby Constituted, Made, Established and Confirmed to be a Commonwealth and Free State: And shall from henceforth be Governed as a Commonwealth and Free State, by the Supreme Authority of this Nation, The Representatives of the People in Parliament, and by such as they shall appoint and constitute as Officers and Ministers under them for the good of the People, and that without any King or House of Lords.[16]

It was thus proclaimed that the dominions belonged to the people of England and were subject to the jurisdiction of their representatives, acting without the concurrence of King or House of Lords.[17] This was a formal announcement of a tremendous innovation, for which no precedent can be found before 1649.[18] When in earlier times the dominions were mentioned in English statutes they were referred to as dominions of the King,[19] or as dominions of the realm,[20] but since the realm itself was spoken of as one of the King's dominions,[21] the variation in phraseology was evidently not intended to indicate any difference in meaning. There was certainly no implication that the dominions belonged to those subjects of the King who happened to reside in England.[22] But now that there had been substituted for the monarchy a republic, based, in pretence at least, upon the sovereignty of the people, it was necessary that the dominions be claimed as possessions of the English people unless the empire was to be dissolved. The Puritan revolutionists,

however anti-monarchical, were not anti-imperialist. They had no thought of letting the dominions go their own way, and when some of the latter showed a disposition to do so, they were subdued by armed force.

* * *

But the issue that Professor McIlwain has raised does not turn upon the character of the Long Parliament and its legislation. The question is whether that revolutionary assembly laid the foundations of parliamentary legislation for the dominions. If so, it would have to be conceded that the legal doctrine of the imperial sovereignty of the British Parliament, which is accepted today by all lawyers and judges throughout the British Empire, was conceived in iniquity.[23]

An examination of the statutes of the Tudor period makes clear beyond doubt that the Parliaments which enacted them did not consider that their authority was confined to the realm of England. Professor McIlwain takes note of the fact that some of these statutes relating to the royal supremacy in ecclesiastical matters applied expressly to the dominions, but he seeks to reconcile this with his hypothesis that Parliament had no right to legislate for them by denying that these acts were really legislative in character. In his opinion they were merely declaratory, affirming a royal authority "assumed (rightly or wrongly) to have existed from a time beyond legal memory in the right of the Crown alone."[24] But there are other Tudor statutes applying to the dominions, which cannot be disposed of in this fashion, since they clearly made new law.

To these we shall now direct our attention, though our survey need not be exhaustive.

Let us consider first the subject of parliamentary legislation for Wales. Before the year 1536 the Dominion or Principality of Wales was not regarded as forming a part of the realm of England, and, with two exceptions during the reign of Edward II, sent no representatives to Parliament.[25] In the Statute of Wales, enacted in 1284 by Edward I, with the advice of the nobles (*proceres*) of England, it was declared that Wales was annexed and united to the Crown of that realm.[26] Coke, in his report of *Calvin's Case* (1608), said that by this statute "Wales was united and incorporated into England,"[27] but in his *Fourth Institute* he laid it down that "the principality and dominion of Wales was incorporated and united to the realm of England" under Henry VIII.[28] Maitland remarks that it is always difficult to pin Coke to a theory. It is sometimes impossible to pin him to a fact. From the wording of many medieval English statutes, however, it is clear that Wales, during the Middle Ages, was regarded as lying outside of the realm of England.[29] Yet Parliament legislated for Wales on many occasions between the time of its conquest by Edward I and its incorporation into the English parliamentary system under Henry VIII. In his famous speech on Conciliation with America Burke gave the following summary of this legislation:

> Sir, during that state of things, Parliament was not idle. They attempted to subdue the fierce spirit of the Welsh by all sorts of rigorous laws. They prohibited by statute the

sending all sorts of arms into Wales, as you prohibit by proclamation (with something more of doubt on the legality) the sending arms to America. They disarmed the Welsh by statute, as you attempted (but still with more question on the legality) to disarm New England by an instruction. They made an act to drag offenders from Wales into England for trial, as you have done (but with more hardship) with regard to America. By another act, where one of the parties was an Englishman, they ordained that his trial should be always by English. They made acts to restrain trade, as you do; and they prevented the Welsh from the use of fairs and markets, as you do the Americans from fisheries and foreign ports. In short, when the statute-book was not quite so much swelled as it is now, you find no less than fifteen acts of penal regulation on the subject of Wales.[30]

In 1536 Parliament passed the well-known Act of Union with Wales.[31] The preamble recites that because of the differences in law and language between England and Wales "some rude and ignorant people have made distinction and diversity between the King's subjects of this realm, and his subjects of the said dominion and principality of Wales, whereby great discord, variance, debate, division, murmur and sedition hath grown between his said subjects." The act provided that Wales should forever be "incorporated, united and annexed to and with this. . . . Realm of England," and that all persons born in Wales should have, enjoy and inherit all privileges "within this Realm and other the King's Dominions as other the King's Subjects naturally born within the same, have, enjoy and inherit." English land law was extended to Wales, and the use of the English language was made compulsory in all

Welsh courts. For the marches, which lay between English shires and Welsh shires, it was provided that some of them should be annexed to English shires, some to Welsh shires, and the rest divided into separate shires. Wales was fully incorporated into the English parliamentary system, and provision was made for its future representation by knights and burgesses in the House of Commons. What is important for our purpose to notice is that this statute was passed by a Parliament in which Wales had no representatives, that it undoubtedly made new law for Wales, and that it was accepted and executed there. It is not known whether Wales was represented in the next two Parliaments held after the Act of Union. The first recorded appearance of Welsh representatives in the House of Commons is in the Parliament of 1542,[32] and they were present in all later Parliaments.

In 1536 another of the King's outlying possessions was given representation in Parliament. For more than two hundred years (1347-1558) the town of Calais and its marches were subject to the Kings of England. Though Edward III actually acquired this territory by conquest, he and his successors professed to rule over it as a part of the Kingdom of France, of which they claimed to be the lawful sovereigns.[33] Many Englishmen emigrated to Calais, and it has been called the first English colony.[34] As the seat of the English wool staple it came to be of the greatest commercial importance, and its loss under Mary was felt to be a serious blow to English prosperity. From time to time Parliament legislated for Calais and provided for the regulation of the staple there. A statute of 1413 directed

that certain revenues of Calais be used to meet local expenditures.[35] In 1421 it was ordained that the King's coinage should be used there.[36] In 1449 an Act of Parliament confirmed the Merchants of the Staple of Calais in all their former privileges.[37] In 1485 a statute was passed relating to actions brought by merchants in the courts of Calais;[38] and a Navigation Act of the same year forbade the purchase or sale in Calais of Gascon wine unless imported in English, Irish or Welsh vessels.[39]

More comprehensive and important than any of the foregoing was "An Act declaring certain Ordinances to be observed in the Town of Calais and Marches of the same," passed in 1536.[40] This provided, among other things, for the form of oath to be taken by the King's deputy and by other officials of the town, forbade the exportation of grain and cattle, directed the mayor to cause inquest to be made concerning "decayed houses" in the town and who owned them, and ordered that no resident of Calais or its marches should keep any "typplyng or chaifferyng house" unless such a person was born "within the Realm of England, Wales, Ireland, the said Town and Marches of Calais or within any of them, and can speak the English language used within the said Realm of England." It provided, furthermore, that Calais should be represented in every subsequent Parliament by two burgesses, one to be chosen by the deputy and council, the other by the mayor, burgesses and freemen of the commonalty of the town. Writs for the election of two burgesses were issued by the chancery and sent to the deputy of Calais in May, 1536,[41] and there is

evidence to show that they were promptly complied with,[42] though the first officially recorded appearance of representatives of Calais in the House of Commons is in the Parliament of 1542. The town was represented in all later Parliaments up to and including that of 1555.[43] It was recovered by the French in 1558.

Let us turn now to the Channel Islands. By an act of 1547 providing for the dissolution of the chantries, passed early in the reign of Edward VI, it was enacted:

> that the King our Sovereign Lord shall from the said Feast of Easter next coming have and enjoy to him, his heirs and successors, for ever, all fraternities, brotherhoods, and guilds being within the realm of England and Wales and other the King's dominions, and all manors, lands, tenements and other hereditaments belonging to them or any of them, other than such corporations, guilds, fraternities, companies, and fellowships of mysteries or crafts, and the manors, lands, tenements, and other hereditaments pertaining to the said corporations, guilds, fraternities, companies, and fellowships of mysteries or crafts above mentioned, and shall by virtue of this Act be judged and deemed in actual and real possession of our Sovereign Lord the King, his heirs and successors, from the said Feast of Easter next coming for ever.[44]

That the phrase "other the King's dominions" was not a mere piece of empty formalism is shown by the fact that the King, by letters patent of April 25, 1550, appointed the Governor of Jersey and certain other persons to be his commissioners, with full power to sell "any of our manors, lands, tenements, parsonages, tithes, rents .... or any other of our rights, titles, possessions, or hereditaments within

our said Isle of Jersey, which came or ought to come to us by reason of the act and statute made in our parliament holden at Westminster in the first year of our reign touching the dissolution and conveying to us of Chantries, Colleges, Free Chapels, Guilds and Fraternities and other things mentioned in the same act." [45]

On various occasions in modern times it has been contended that Acts of Parliament were not binding of their own force upon the Channel Islands even though the latter were expressly mentioned therein, that such acts acquired the force of law in the islands only after formal transmission to them and due registration in their courts; and it has been doubted whether the courts were legally bound to register transmitted acts.[46] The question of whether the registration of an Act of Parliament was necessary in order to make it binding upon the islands appears to have arisen for the first time in 1698 upon a petition from Jersey to the King in Council asking for the suspension of the Navigation Act of 1660. It was then held by the attorney-general that the registration of an act in which Jersey was named was not necessary to make it obligatory there, and that such registration was only for the convenience of the island, an opinion which was concurred in by the Committee of the Privy Council for the Affairs of Guernsey and Jersey.[47] An order in council of May 7, 1806, declared that the registration of an Act of Parliament transmitted to the islands was not essential to its operation there;[48] and in a report published in 1847 royal commissioners, who had been appointed to investigate the subject

of criminal law in the Channel Islands, said that an Act of Parliament mentioning Jersey was "immediately" law there, "without registration."[49] In the rules made at various times by the King in Council for the registration of Acts of Parliament in the islands there was no suggestion that registration should be in any sense discretionary with the local courts.[50] An order in council of July 1, 1731, provided "that for the future whenever any Act shall be passed in the Parliament of Great Britain relating to the said islands of Jersey and Guernsey, printed copies of such Acts shall be transmitted by the Clerk of his Majesty's Privy Council as soon as conveniently may be to the Royal Courts of the said Islands, signifying to them at the same time, his Majesty's Pleasure, to Register and Publish the said Acts, and to cause the same to be carried into due Execution."[51]

The statement, often made, that Parliament has never taxed the Channel Islands would seem to need modification in view of the following facts. During the reign of William III provision was made for the establishment of a royal hospital at Greenwich for the relief of disabled seamen, and an Act of Parliament of 1696 provided that all seamen serving in ships belonging to "any of the subjects of England, or any other his Majesty's dominions" should pay "six pence *per mensem* for the better support of the said hospital."[52] By an act of 1711 the admiralty was empowered to appoint receivers of this duty and to authorize them to depute the collectors or other officers of the customs "of the several out ports of this kingdom, and of the ports of

the kingdom of Ireland'' to collect the same,[53] but no mention was made of the Channel Islands, the Isle of Man or the oversea colonies. An act of 1729, after reciting that the duty had not been collected in any of these dominions, in spite of the intent of previous statutes, expressly decreed that these statutes should be deemed to extend to all ships belonging to any of the King's subjects within the ''islands of Jersey, Guernsey, Alderney, Sark and Man . . . . and within all and every his Majesty's colonies, islands and dominions in America, as well as to those within Great Britain and Ireland,'' and that for the future all seamen employed in ships belonging to any of the King's subjects within those islands and colonies should, with certain exceptions, pay the duty. For the collection thereof it gave power to the persons appointed under the act of 1711 as receivers of the duty to appoint collectors in the ports of the said islands and colonies and ''authorized and required'' the latter to collect the duty ''in the several ports of the said islands of Guernsey, Jersey, Alderney, Sark and Man . . . . and also in the ports of all and every his Majesty's colonies, islands and dominions in America.''[54] An order in council of July 1, 1731, directed that a printed copy of this act should be transmitted to the royal courts of Jersey and Guernsey, which were required to register and publish it and cause it to be executed. It was duly registered by the royal court of Jersey, and presumably the same procedure was followed in the other Channel Islands.[55]

The history of the Isle of Man, which, like the Channel Islands, has never been a part of the realm of England,

yields some data of significance for our purpose. Man was a subordinate kingdom, the rulers of which were at one time subject to the Kings of Norway, later to the Kings of Scotland, and finally to the Kings of England.[56] Early in the fifteenth century Henry IV of England granted the island to Sir John Stanley and his heirs, to be held of the Crown by a form of feudal tenure, and for a hundred years Sir John and his successors were styled "Kings of Man." During the reign of Henry VII the King of Man took the title of "Lord of Man," but the change in title involved no surrender of authority, and the Lords of Man continued to enjoy all the rights and prerogatives which their predecessors had possessed until, in 1765, the government of the island was revested in the British Crown by Act of Parliament.[57]

In 1542 we have a clear case of parliamentary legislation for Man. An English statute of that year provided for the separation of the diocese of Man from the metropolitical jurisdiction of Canterbury and its transfer to that of York.[58]

During the reign of Queen Elizabeth a dispute arose respecting the Manx succession, during the course of which the Queen took immediate possession of the island and appointed a governor. The controversy was referred to the Lord Keeper of the Great Seal, the Chief Justices of the Queen's Bench and Common Pleas, the Chief Baron of the Exchequer and others of the Privy Council, who decided, *inter alia*, that the Isle of Man was "an ancient kingdome of it selfe, and no part of the kingdome of England," and

that general Acts of Parliament did not extend to the island. But they held that "by speciall name an act of parliament may extend to it."[59] The claimants to the Manx throne at length reached an agreement, and in 1609 James I, by letters patent, granted the island to William, Earl of Derby, a brother of the preceding Lord of Man, and his wife. This settlement of the Manx succession was confirmed, with further limitations, by a private Act of Parliament passed in 1610, entitled "An Act for the Assuring and Establishing of the Isle of Man."[60] Speaking of this episode Spencer Walpole says:

> In the interregnum, from 1595 to 1610, the Crown of England had exercised the rights of sovereignty by the appointment of governors; the courts of England had examined and decided the right of succession to the Manx throne; and finally, the Parliament of England had assured and established the island in the Stanley family. In such circumstances, the island might still claim to be an ancient kingdom; it could no longer claim to be an independent kingdom. It was evidently subject to the English Crown, and liable to be regulated by the English Parliament.[61]

In 1651 the Isle of Man surrendered to the armed forces of the Commonwealth, and for nine years it was ruled under authority derived from the revolutionary government of England. Shortly after the Restoration of the Stuarts to the English throne the Stanley dynasty was restored in Man, and presently the question arose whether the Act of Indemnity, passed by Parliament in 1660, applied to the island. In this act mention was made of Ireland, Wales, Jersey, Guernsey "and other his Majesty's Dominions,"

but not specifically of Man.[62] On this ground the restored Lord contended that his island did not come within the scope of the act, though even he did not question the right of Parliament to legislate for Man if it chose to do so.[63] In 1663 the judges of England, having been asked by the Privy Council for their opinion, held that the Act of Indemnity "did and ought to be understood to extend into the Isle of Man as well as into any other of His Majesty's Dominions and Plantations beyond the Seas," and that, "being a Publique General Act of Parliament it ought to have been taken notice of by the Judges in the Isle of Man although it had not been pleaded and although there were no Proclamation made thereof."[64] From the foregoing it appears that Blackstone stood upon solid ground when he said that Man, though a territory distinct from England, was bound by Acts of Parliament if it was expressly named.[65]

A good many Tudor statutes, apart from those dealing with ecclesiastical matters, mentioned the dominions in general. An act of 1534 provided that any person rebelliously withholding from the King any of his castles or fortresses within the realm, "or in any other the King's dominions or marches," should be deemed guilty of treason.[66] A statute of 1544 prescribed the form of the King's title and ordered that it should be accepted by "all and singular his Grace's subjects and resiants of or within this his Realm of England, Ireland, and elsewhere within other his Majesty's dominions."[67] In 1541 it was enacted that all the King's subjects of the realm of England and Wales,

Jersey, Guernsey, Berwick and Calais should be pardoned for all heresies, treasons and felonies (with certain exceptions) committed before July 1 of that year.[68] On July 20 the Governor of Jersey wrote to the bailiff and jurats of the island, informing them that the King in his last Parliament had granted a general pardon to his subjects "as well within this his Grace's Realm as other his dominions" and directing them to permit a certain person to enjoy its benefits in Jersey.[69] In 1547 all persons were forbidden to export horses, without special license, "out of this realm, or the dominions of the same" to any place beyond the sea, upon penalty of forfeiture of the property and a fine.[70] In 1554 it was provided that any person bringing counterfeit coin from abroad "into this realm, or into any of the dominions of the same" should be deemed guilty of high treason.[71]

To judge from an act of 1536 Tudor Parliaments did not scruple even to impose customs duties on the dominions, for it provided that "every stranger and denizen, which shall ship, send or convey any leather over the sea, out or from any port of this realm, Wales, Cheshire, or any other the King's dominions, shall pay like custom for the same as is used to be paid within the port of London." It gave authority to the "customers and comptrollers" of every "port, haven and creek within this realm, Wales and other the King's dominions," from which leather might be exported, to appoint "one able person to tell and number all such leather as shall be at any time there shipped . . . . the same teller taking of every stranger for the telling of every

dicker of leather vi d., whereof the same teller to have for his labour ii d., and iv d. to be to the commonalty of the same town and port."[72]

Several statutes of Elizabeth's reign referred to the dominions and were clearly intended to bind them. An act of 1566 forbade the exportation of live sheep "out of this realm of England, Wales or Ireland, or out of any of the Queen's Highness dominions," and justices of the peace "in every county and shire within this realm of England and Wales, and other the Queen's Majesty's dominions" were empowered to hear and determine offences committed in violation of the act.[73] A Navigation Act of 1571 made it lawful for any of the Queen's subjects, for a term of years, "to bring into this realm, or any other your Highness dominions" such fish of specified varieties as they might happen to take "by their own fishing in vessels with cross sails."[74] By a statute of 1581 all persons were to be adjudged traitors who should attempt to free or withdraw "any of the Queen's Majesty's subjects, or any within her Highness realms and dominions, from their natural obedience to her Majesty."[75] In 1585 all Jesuits and priests ordained under any authority from the See of Rome were ordered to depart "out of this realm of England and out of all other her Highness realms and dominions."[76]

What comes nearest to a formal declaration by a Tudor Parliament of the right to legislate for the dominions is to be found in the preamble of Mary's Second Act of Repeal (1554), which swept away all anti-papal legislation of the reigns of Henry VIII and Edward VI. The words are:

"We the Lords Spiritual and Temporal and the Commons, assembled in this present Parliament, representing the whole body of the Realm of England, and the Dominions of the same."[77]

It is true that in the early period of English colonial expansion Parliament did not legislate for the colonies, though it sometimes gave consideration to colonial questions. It may be that the first two Stuart sovereigns, with their lofty conceptions of royal prerogative and their numerous controversies with the House of Commons, convinced themselves that the American colonies did not lie within the range of parliamentary authority.[78] At any rate, when a bill for greater freedom of fishing on the coasts of Newfoundland, New England and Virginia came before the House of Commons in 1621, and the opinion was expressed that Parliament had the right to legislate for Virginia, one of the King's ministers said that the House ought not to proceed with the bill because it concerned America. The view that he took, apparently, was that the American colonies were dominions belonging to the King personally, not dominions of the Crown of England, and that as such they were not subject to the jurisdiction of Parliament. A member of the House, in an account which he wrote of the debates of this session, recorded the minister as saying that "*Virginia, New England, Newfoundland*, and those other foreign parts of *America*, are not yet annexed to the Crown of *England*, but are the King's as gotten by Conquests," and that therefore he thought it "worthy the Consideration of the House, whether we shall here make

Laws for the Government of those Parts; for he taketh it, that in such new Plantations the King is to govern it only by his Prerogative, as his Majesty shall think fit." [79] Sir Edwin Sandys, one of the leaders of the opposition party, said that Virginia, New England and Newfoundland had been annexed to the Crown. Another member of the House observed that the bill did not affect the royal prerogative, for, he said, "what is here done is done but by the King himself; for his Majesty hath a negative Voice, so as he may refuse whether any such Bill may pass or no, though it hath before passed both houses." [80] This speaker held what was undoubtedly the sound legal view, that an Act of Parliament was an expression of the King's pleasure, not the expression of a will distinct from or opposed to his. The bill did not become law, though its failure does not seem to have been caused by considerations of constitutionality.[81] In 1624 the House of Commons was petitioned to take into consideration the affairs of the Virginia Company and its colony, but a letter from James I led to the withdrawal of the petition. In this the King took the ground that it was "very unfitt for the Parliament to trouble themselves with those matters." As for the affairs of Virginia, he said, "ourself have taken them to heart, and will make it our own worke to settle the quiet, and wellfare of those plantations, and will bee ready to doe anything that may bee for the reall benefitt, and advancement of them." The royal order, we are told, "was assented to by a general silence, but not without whispers that by such means any business might be taken out of the hands of parliament." [82]

If we possessed full records of parliamentary debates in the early seventeenth century, we should probably find that there was a good deal of discussion on the subject of constitutional relations in the nascent colonial empire.

Even James I and his successor, however, seem to have had no objection to parliamentary legislation for the dominions in general. A statute passed in 1605, shortly after the disclosure of the Gunpowder Plot, provided that on the fifth day of November in every year thanks should be given for the happy deliverance of the King and Parliament by all ministers in cathedral and parish churches "within this Realm of England and the Dominions of the same," and that all inhabitants of "this Realm of England and the Dominions of the same" should always attend church on that day.[83] By another act of the same year it was made treasonable for any person "upon the seas or beyond the seas, or in any other Place within the Dominions of the King's Majesty" to attempt to withdraw any of his subjects from their obedience to him, or to reconcile them to the Church of Rome.[84] An act of 1625 for the punishment of offences committed on Sunday forbade the holding of "meetings, assemblies or concourse of people out of their own Parishes on the Lord's day within this Realm of England, or any of the Dominions thereof, for any sports or pastimes whatsoever."[85]

Nor does it seem to have been supposed that the dominions lay beyond the scope of Parliament's taxing power. It is true that when direct taxes were levied under James I and Charles I there was an express provision that they

should not apply to Scotland, Ireland, Jersey or Guernsey,[86] but the dominions were mentioned in the acts granting to these Kings the import and export duties known as tunnage and poundage. The grant of these duties to James I was made in the following words:

> We your said Commons, by the Advice and Consent of the Lords Spiritual and Temporal in this your present Parliament assembled, and by the Authority of the same .... do give and grant to you our Supreme Liege Lord and Sovereign, one Subsidy called Tonnage; That is to say, Of every Ton of Wine that is or shall come into this Realm or any your Majesty's Dominions by way of Merchandise, the sum of Three Shillings, and so after that Rate. .... And also one other Subsidy called Poundage, That is to say, Of all manner of Goods and Merchandise of every Merchant Denizen and Alien carried or to be carried out of this Realm or any your Majesty's Dominions, or to be brought into the same, by way of Merchandise, of the value of every Twenty Shillings of the same Goods and Merchandise, Twelve Pence, and so after the [that] Rate.[87]

The same language was used in the Tunnage and Poundage Act of Charles I's reign.[88]

It appears, then, that Parliament was legislating for the dominions long before the revolutionary Act of 1649, long before the founding of the English colonies in the New World. It is probably true that some of the statutes that have been referred to were not enforced in the dominions, but it has been shown that this was certainly not true of all of them. The question of enforcement, however, is not vital to the argument, for the validity of a law does not depend upon its enforcement or even its enforceability. There have

been statutes applying only to the realm of England which have not been enforced, but it would not be asserted that they were invalid on that account. There was no doubt in Coke's mind that Acts of Parliament were binding upon any dominion if it was named or by general words included in the Act.[89]

* * *

But even if Parliament's imperial authority was not revolutionary in the seventeenth century, was it not once so? Was there not a time when its jurisdiction was confined to the realm of England? If we follow the stream of parliamentary history to its sources, shall we not find somewhere an act of usurpation? In an attempt to answer these questions it will be convenient to confine ourselves to a summary survey, in inverse chronological sequence, of Parliament's relation to the single dominion of Ireland during the Middle Ages.[90]

In 1423 a statute was passed applying to Ireland and Wales as well as to England. This required that all wool, woolfells, leather, lead and tin exported from England, Wales and Ireland should be sent to Calais, then under the rule of the English King, as long as the staple of those commodities continued to be located there.[91] In 1413 Irishmen holding offices or benefices in Ireland were forbidden by Act of Parliament to absent themselves from them.[92] This was re-enacted in 1422.[93] In 1357 an ordinance for Ireland was promulgated by the King with the assent of the council. It is possible, however, that this was not enacted in a parliament, though it was included by the record com-

missioners in their edition of the statutes,[94] and it appears in some earlier editions.

In 1353 what is known as the Ordinance of the Staples was made at a great council held at Westminister by the King with the "counsel and common assent" of the "prelates, dukes, earls and barons, knights and commons."[95] According to the record commissioners this was not entered on the statute roll, but was found on a roll preserved among the parliament rolls in the Tower of London.[96] It is a comprehensive document containing twenty-eight chapters and filling nearly twelve pages in the folio edition of *The Statutes of the Realm.* It provided that the staple of wool, woolfells, leather and lead for England, Wales and Ireland should be held at designated towns in those countries — for Ireland, at Dublin, Waterford, Cork and Drogheda. Before exportation the commodities mentioned were to be brought to one of the staple towns, where the duties were to be paid, after which they were to be exported only by foreign merchants, "and not by Englishmen, Welshmen, nor Irishmen." In every staple town there was to be a mayor possessing knowledge of the law merchant and two constables with power to arrest and imprison offenders for "debt, trespass, or other contract." They were given jurisdiction within the staple towns in all cases touching the staple, and such cases were to be tried by the law merchant and not by the common law or local borough usage.

In 1331 several enactments for Ireland were made by the King with the advice of the council in a parliament held at

Westminister. By these it was provided, among other things, that the justiciar of Ireland should not pardon murderers, that sheriffs and coroners should be elected by the counties, that no seneschal of a lord in Ireland should be appointed to any royal office, and that customs collectors should be burgesses of the towns in which they were to collect the customs. These laws were transmitted to the justiciar, chancellor and treasurer of Ireland, with a mandate for their observance and enforcement there, and they were enrolled in the exchequer at Dublin.[97]

In 1323 articles for the reform of government in Ireland, known as *Ordinatio de Statu Terrae Hiberniae*, were enacted by the King in council at Nottingham. The document makes no mention of the presence at this meeting of magnates, knights of the shire or burgesses, but the time had not yet come when a session of the council was clearly distinguished from a parliament; only a few years before this, in 1305, such a session was described in a parliament roll as *plenum parliamentum*, though neither magnates, knights nor burgesses were in attendance.[98] The *Ordinatio* was entered on the statute roll and is included in the record commissioners' edition of the statutes.[99] It forbade the purchase by royal officers in Ireland of lands within their bailiwicks without the King's license, restricted purveyance, provided that merchants might export their goods from Ireland to England and Wales upon certain conditions, regulated fees, and ordained that common-law writs in Ireland should be sealed by the great seal of Ireland. It was sent to the chancellor of Ireland with a mandate for

its enrollment in the chancery at Dublin and transmission to the King's judges and officers in Ireland, to be published and observed by them.[100]

In a parliament at York in 1318 a number of statutes were enacted that applied to Ireland. The purpose of this legislation was indicated in the preamble:

> Forasmuch as many people of the realm of England and of the land of Ireland have heretofore often times suffered mischiefs and disherisons, by reason that in some cases where the law failed, no remedy was ordained; and also forasmuch as some points of the statutes heretofore made had need of explanation; our lord King Edward, son to King Edward, desiring that full right be done to his people, in his parliament at York, in three weeks of St. Michael, the twelfth year of his reign, by the assent of the Prelates, Earls, Barons, and the commonalty of his realm there assembled, ordained the acts and the statutes here following, the which he wills to be firmly observed in the said realm and in the said land.[101]

These statutes were transmitted to the chancellor of Ireland, who was ordered to cause them to be enrolled in the chancery, exemplified under the great seal of Ireland and sent to the several counties of the land, with writs to the sheriffs, commanding them to publish and observe the same.[102]

The well-known Statute of Merchants was made by King Edward I in his council at a parliament held at Acton Burnel in 1283.[103] Complaint having been made that it had been misinterpreted to the injury of the merchants, the King in a parliament held at Westminster in 1285 caused it to be rehearsed, and for clarification of its meaning and

intent enacted a supplementary statute, which expressly applied to Ireland as well as to England.[104] This, together with certain other statutes made in England, was transmitted to Ireland to be proclaimed and observed there.[105]

Our last illustration comes from the early part of the reign of Edward I and is a case of taxation. In a "general parliament" held at Westminster in April, 1275, there were granted to the King export duties of one-half mark on each sack of wool, one-half mark on each three hundred woolfells, and one mark on each last of hides. At first these duties were known as "the new custom," but afterwards and for several centuries as "the ancient custom." [106] The text of the original grant is not extant, but its substance is known. From an entry in the fine rolls of Edward I (May 21, 1275) [107] it would appear that the grant was made by the magnates of the realm at the petition of the merchants of all England, but other contemporary references to it indicate that knights of the shire and burgesses, who are known to have been summoned to this parliament, participated in the grant. In a charter issued by one of the magnates in the parliament it is stated that the communities of the realm (*communitates eiusdem regni*) assented to the tax,[108] and in a writ to the justiciar of Ireland the King says that the grant was made by the archbishops, bishops, abbots, priors, earls, major barons, "and the whole community of our realm" (*et tota communitate regni nostri*).[109] Professor N. S. B. Gras, who has written the most reliable history of the early English customs, regards it as established that the knights and burgesses assented to the tax.[110]

The documents that have been referred to agree that the grant of 1275 applied to Wales as well as to England, and the King promptly appointed certain merchants of Lucca to act as collectors of the duties on wool, woolfells and hides exported from England *and Wales.*[111] The significance of this should not be overlooked. Wales in 1275 was assuredly not a part of the realm of England; in the letters patent appointing the collectors, "terra Walliae" is distinguished from "regnum Angliae." [112] Yet here we have a parliament at Westminster granting taxes to be paid in Wales and provision at once made for their collection.

But our particular concern is with Ireland. The record in the fine roll indicates that the duties were to be paid on the commodities in question when exported from England, Wales and Ireland. It was provided that certain persons were to be sworn to answer to the King "de cheskun sak de laine demi mark e de chescun treis cenz de peaus ke funt un sak demi mark e de chescun last de quyr un mark ke isteront hors de Reialme ausi ben en Hirlaunde en Wales come en Engleterre dedenz franchise et de hors." [113] What might seem to be contradictory evidence, so far as Ireland is concerned, is found in a charter issued in the parliament on May 19, 1275, by William de Valence, titular Earl of Pembroke and half-uncle of the King, who had come into possession, through marriage, of vast estates in Ireland, including the liberty of Wexford.[114] In this the Earl, after reciting that duties had been granted to the King on wool, woolfells and hides exported from England and Wales, to be collected in every port, "as well within liberties as

without,'' granted for himself and his heirs, that the King should have the same duties on the same commodities when exported from his (the Earl's) ports in Ireland, as well within his liberties as without.[115] And in a writ sent to the justiciar of Ireland on May 25 the King informed him of the taxes that had been granted on wool, woolfells and hides exported from England and Wales and commanded him to induce the magnates, communities and merchants of Ireland to make a similar grant.[116] This might seem to conflict with the evidence of the fine roll and to show that the duties granted in parliament did not apply to Ireland. But in the same writ the King directed the justiciar to admit certain persons who had been deputed to collect the taxes in Ireland, and to aid them in the discharge of their duties.[117] Furthermore, letters patent were issued on the same day to all the King's bailiffs of Ireland, notifying them that he had appointed these persons to collect the duties on wool, woolfells and hides *exported from Ireland* and to be answerable to him at his exchequer in Dublin, and commanding them to aid the collectors.[118] It thus appears that the King took steps to enforce the payment of the duties in Ireland on the strength of the parliamentary grant alone. Though he desired that a similar grant should be made in Ireland, it seems evident that he did not regard this as necessary to authorize the collection of the taxes there; and, so far as I know, there is no record to show that such a grant was ever made.

There is abundant evidence, however, that the ''new custom'' of 1275 was collected in Ireland. On September

22, 1276, the King commanded the collectors of Ireland to render their account of the new duties twice a year to the treasurer of the exchequer at Dublin, and directed the latter to send him a transcript of this account at the end of the year.[119] In a writ of November 18, 1276, he informed the justiciar of Ireland that the merchants of that country had complained that the collectors had exacted from them ten shillings for each sack of wool on the ground that sacks in Ireland were larger than in England, and he commanded him not to allow more than half a mark to be exacted for each sack till further orders.[120] The records of the Irish exchequer prove beyond question that the duties were regularly collected in Ireland,[121] and they came to be an important item in the King's Irish revenue. Of the total receipts of the Irish exchequer for the twenty-sixth year of the reign, amounting to £4,431. 18s. 0d., the custom of 1275 produced £674. 13s. 8d.[122] Sometimes the proceeds of the duties were assigned by the King in payment of his debts.[123]

The conclusion that forces itself upon us from this hasty backward survey is that the jurisdiction of parliament was never confined to the realm of England. From the earliest times parliaments were imperial in the scope of their authority. This view is confirmed by what is known of their procedure with respect to petitions. The answering of petitions, which came in large numbers from outlying dominions of the king — from Ireland, from the Channel Islands, from Gascony — as well as from England, was an important part of the business of parliaments in the late

thirteenth and early fourteenth centuries,[124] and precisely the same kind of action was taken with respect to the former as to the latter. Between the right to answer petitions and the right to legislate no distinction can be drawn that would be valid for a time when statutes were often enacted in response to petitions.

* * *

The origin of parliamentary authority over the dominions is to be explained, I am convinced, not on any theory of usurpation, but by the original character of parliaments. The modern British Parliament is derived historically from the *parliamenta* of Edward I, but such changes have been wrought during an evolution of six centuries that a portrait of the descendant bears very little resemblance to that sketch of the ancestor which recent research has drawn for us.[125] As Professor Pollard remarks, "parliaments in their infancy were much that parliament today is not, and little that it is,"[126] and the same thought was suggested much earlier by Maitland in an essay that was the starting-point of the recent scientific study of early English parliaments, when he said: "It is hard to think away out of our heads a history which has long lain in a remote past, but which once lay in the future; it is hard to be ever remembering that such ancient terms as *house of lords* and *peers of the realm* were once new terms. . . . We must judge the rolls of Edward I's reign on their own merits without reference to the parliament rolls of his grandson's, or of any later, reign."[127]

We should realize, to begin with, that parliaments were

originally, in fact as well as in form, sessions of a royal council. The King was not only an element in their constitution; he was the essential element. The *parliamenta* of Edward I, the proceedings of which are recorded in the first volume of the published *Rotuli Parliamentorum,* were formal meetings or parleys of the King's council, and apparently any such meeting was a *parliamentum.* "It is but slowly," says Maitland, "that this word is appropriated to colloquies of a particular kind, namely, those which the king has with the estates of his realm, and still more slowly that it is transferred from the colloquy to the body of men whom the king has summoned." [128] A session of the King's council might or might not be reinforced by the attendance of magnates, whose successors were in time to be known as the House of Lords, and elected representatives of the counties and boroughs, the constituent elements of the later House of Commons, but their presence was not essential and did not add to the legislative or judicial authority of the assembly. A meeting of the King in council alone was not only a parliament but a "full" parliament.[129] "The highest tribunal of the realm," to quote Maitland again, "is the king in council; it is the king in his council in his parliaments, in the presence of prelates, barons, and other learned men. To deny that it is the king in council is impossible; to deny that it is the king in parliament, or rather that its sessions are parliaments, is impossible." [130] Before long parliaments were to become something different from meetings of the King's council, the council was to fall into the background in parliament, its members being reduced

to the level of assistants to the lords,[131] and distinctions were to be drawn between the authority of the council and the authority of parliament. The time was to come when men in the dominions would deny that they were subject to the jurisdiction of parliament while admitting that they were subject to the jurisdiction of the council. But such distinctions could have been made by no one at a time when a parliament was "no more than the counsellors of the king sitting in a particular kind of session called a parliament." [132]

It follows from the nature of early parliaments that they could never have been thought of as "parliaments of England." Such an expression would have been meaningless. Parliaments were sessions of the council, and the council was the council of the King, not the council of England. The early parliament rolls say much of *consilium regis*, but they do not speak of *consilium Angliae*. "Those English historians," says Professor Tout, "have gravely erred who have described the Norman or Angevin chancery as the 'chancery of England.' It was the chancery neither of England nor Normandy, neither of Anjou nor of Aquitaine. It was the king's chancery, and its acts had equal authority in all parts of his dominions." [133] The chancery followed the court, and when the Plantagenet Kings were in residence in their French possessions it functioned there as a matter of course.[134] What was true of the chancery was equally true of the council. It could act in France as well as in England. If need arose it could be partitioned temporarily; "part could attend the king abroad or on a campaign;

another part could remain at home at the seat of government and give advice to the regent, just as the itinerating council could give advice to the king.'' [135] Edward I, when about to leave Gascony in 1289, issued a patent which shows that he regarded his council at Bordeaux ''as an integral part of the 'familia regis,' and assumed that this view would be permanently held.'' [136] The council did not become less the King's council because some of its sessions, some of its *parliamenta*, were attended by magnates and representatives of English counties and boroughs. In the days of Edward I no subject of the King, whether resident in Ireland, Jersey, Gascony or elsewhere within the King's dominions, would have regarded it as an alien or external or distinctively English authority.

Another fact to be remembered about early parliaments is that representation was not essential to their existence. There were parliaments long before there was a House of Commons, and for some time after representatives of the counties and boroughs began to attend, their presence was very irregular and was not regarded as necessary. Elected knights and burgesses seem to have been summoned to only a few of the many parliaments of Edward I, and very seldom do they appear to have participated in legislation.[137] It is doubtful if during this reign they were ever admitted to the council as members or shared in its deliberations. The rolls of parliament speak of assemblies at which it is known that knights and burgesses were not present as ''full'' and ''general'' parliaments.[138] Our earliest description of an English parliament is found in the late thirteenth-

century treatise on English law that goes by the name of *Fleta*. The passage in question occurs in a brief account of the different courts, and may be translated as follows: "For the king has his court in his council, in his parliaments, in the presence of the prelates, earls, barons, great men and other learned men, where judicial doubts are determined, and when new injuries have arisen new remedies are provided, and justice is there meted out to each one according to his deserts." [189] Here, it will be noticed, is no mention of elected representatives. As yet, the assent of "the commonalty of the realm" was not necessary for the enactment of a statute, representation could not be coupled with legislation, and there was no need of a doctrine of "virtual representation" to justify parliamentary legislation for the dominions. The time was to come when it could be said that parliament's relations to the realm and to the dominions were different, because it represented the former but not the latter. Then it could fairly be argued that the dominions were entitled in justice to representation in parliament.

If we succeed in forgetting "a history which has long lain in a remote past, but which once lay in the future," and follow our most reliable guides to a comprehension of the nature of early parliaments, we shall not find it surprising that the highest of all the King's courts, the court which he held in his council in his parliaments, was the supreme tribunal for all his subjects. Nor shall we be disposed to attribute the origin of its jurisdiction over the King's dominions to any act of usurpation. We can, indeed,

trace this jurisdiction far beyond the days of Edward I; we can see it in operation long before the term *parliamentum* was first applied to a session of the King's council. The patent rolls of the reign of Henry III show us that the council in the early thirteenth century was the "final deciding, authorizing and legislating body,"[140] and that it acted in this capacity for the dominions as well as for the realm.[141] Much of its work might be described as administrative regulation, but between such regulation and more general legislation no sharp line can be drawn. As far back as we can go in the history of the council, it appears as the King in action. It exercised authority over the dominions simply because it was the King's council and they were the King's dominions.

Chapter II

IRISH PATRIOTISM AND BRITISH IMPERIALISM

It was in Ireland and during the period of the Puritan Revolution that Parliament's imperial authority was first seriously challenged. In this chapter some account will be given of the prolonged efforts of Irish patriots to free their country from what they regarded as an alien tyranny, and the historical arguments on which they based their constitutional claims will be examined critically.

The Earl of Strafford, Charles I's Deputy in Ireland, aroused resentment among all influential classes of the Irish people by his policy of "Thorough," and charges against his administration made by the Irish House of Commons soon after his return to England, in 1640, were used by the parliamentary leaders at Westminster in formulating articles of impeachment against him. One of the grounds for the impeachment, contained in a set of articles which the English House of Commons presented to the Lords on January 30, 1641, was that the Earl, in order to alienate the people of Ireland from the King's government of that realm and to subvert its "fundamental laws," had declared publicly that Ireland was a conquered nation and that the King might do with its people as he pleased.[1] Subsequent events were to make it plain that the English Puritans were concerned for Irish freedom only because

they hated and feared Strafford; if he had chastised the Irish with whips, Cromwell was to chastise them with scorpions. But for the time being it suited the purposes of the English parliamentary leaders to ally themselves with the Irish Parliament against the common enemy.

In protest against the Strafford régime the Irish House of Commons, on February 16, 1641, declared that the people of Ireland were "free, loyal, and dutiful Subjects," to be governed "only by the common Laws of *England* and Statutes of Force in this Kingdom, in the same manner and Form as his Majesty's Subjects of the Kingdom of *England* are, and ought to be governed by the same common Laws and Statutes of Force in that Kingdom, which of Right the Subjects of this Kingdom do challenge, and make their Protestation to be their Birthright and best Inheritance." Since, however, the unlawful actions and proceedings of the late administration tended to violate the rights of the King's Irish subjects, the House propounded a series of questions and asked the Lords of the Irish Parliament to require the judges to answer them in writing, "not for any Doubt or Ambiguity which may be conceived or thought of . . . . but for Manifestation and Declaration of a clear Truth, and of the . . . . Laws and Statutes already planted, and for many Ages past settled in this Kingdom."[2] The first question was: "Whether the Subjects of this Kingdom be a free people, and to be governed only by the common Laws of England and Statutes of Force in this Kingdom?" On May 25 the replies of the judges were delivered by the Lords to the

Commons.[3] To the first question the judges answered: "That the Subjects of this Kingdom are a Free People, and are for the general to be Govern'd only by the Common Laws of England, and Statutes of Force in this Kingdom," but they added that the word "only," in the question submitted to them, must receive a "benign exposition" before a general answer in the affirmative could be given. As to whether Ireland was subject to the legislative authority of the English Parliament, a point not explicitly raised by the question, they expressed no opinion.

The Commons were not satisfied and made arrangements for a conference with the Lords concerning the questions and the "pretended answers" of the judges. They appointed Patrick Darcy, a Catholic lawyer and a member of the House, as their spokesman at this conference and directed him to explain why they had presented the questions and to give particular reasons for each of them.[4] The conference was duly held, and at it Darcy delivered a long "argument," which was later published,[5] in the course of which he contended that the English Parliament had no right to make laws for Ireland. He seems to have drawn a distinction, which was later to receive much emphasis, between its right to *declare* law and its right to *make* law for Ireland. He apparently meant to concede the former, but he said that new legislation by the English Parliament had never been received in Ireland until enacted by the Irish Parliament.[6]

The Commons, furthermore, proceeded to record, in the form of declarations, their own opinion of the law on the

questions that had been submitted to the judges. In answer to the first they voted unanimously, on July 26, "that the Subjects of this his Majesty's Kingdom are a free People, and to be governed only according to the common Law of *England*, and Statutes made and established by Parliaments in this Kingdom of *Ireland*, and according to the lawful Custom used in the same." [7] This amounted to a declaration that Ireland was not subject to the legislative authority of the English Parliament; nor did it hint at any distinction between Parliament's power to *declare* and to *make* law for Ireland. It did not, however, claim for the Irish Parliament a right to initiate legislation. By an Irish statute of 1495, the well-known "Poynings' Law," legislative initiative lay with the Lord Lieutenant and Council of Ireland, and no bill could be introduced in the Parliament of Ireland unless it had been approved by the King and Council in England.[8]

* * *

Much has been written on the Irish Catholic Rebellion that broke out in Ulster in October, 1641. There can be no doubt that the Catholics of Ireland had actual grievances, religious and agrarian in particular. But the immediate cause of their uprising was fear of what would happen to them under the rule of an English Puritan Parliament. Richard Bellings, a member of the Irish House of Commons in 1641 and conspicuously associated with the Catholic Confederation which was formed in the following year, wrote a history of the events in which he had borne a prominent part, and in this he recorded his opinion that

of the reasons given by the insurgents for their resort to arms "the most pregnant" related to "the apprehensions they had of the designe in the Parliament of England wholly to suppresse the exercise of the Catholicke religion among them."[9] From the outset and continuously the insurgents protested their loyalty to Charles I and declared that they were acting in defence of his prerogative as well as of their faith. In the documents in which they sought to justify their appeal to the sword they not only expressed their fear of the English Puritan Parliament but denied that it possessed any lawful authority over Ireland.

News of the Irish Rebellion reached the English Parliament at the beginning of November, 1641, and measures were at once taken to meet the emergency. The ingenious idea of making rebellion pay for its own suppression soon occurred to parliamentarian minds, and on December 1 the King was petitioned to reserve the disposal of Irish lands forfeited by reason of the Rebellion, in order that some satisfaction might be made to his English subjects for the expenses they were likely to incur in putting it down.[10] In the following February "divers worthy and well affected persons," zealous Puritans no doubt and sound imperialists, and manifestly possessed of a sharp eye to the main chance, approached the House of Commons with an attractive financial proposition. They pointed out that many millions of acres of land in Ireland had become liable to confiscation, and they said that a fund of £1,000,000 could easily be raised for "the reducing of the rebels," if two and

a half million acres were assigned to subscribers. "This monstrous scheme of confiscation," in the words of Gardiner, "was received without a word of objection,"[11] and a bill incorporating all of its provisions was duly passed and became law in March.[12] This was one of the last enactments of the Long Parliament to which the King gave his assent, and he did so, in his own words, "without taking time to examine whether this course may not retard the reducing of that kingdom by exasperating the Rebels, and rendering them desperate of being received into grace if they shall return to their obedience."[13] The King's action on the bill was superfluous from the point of view of Parliament, since it had already assumed the power of legislating without his assent.[14] The exasperation of the rebels was a foregone conclusion, and this sweeping measure of confiscation only stiffened them in their resistance to the principle of parliamentary legislation for Ireland.

At a General Assembly held at Kilkenny in October, 1642, which was practically a parliament of the insurgent population, the Catholic Confederation was definitely organized. By this time the insurgents had been joined by a number of the Catholic members of the Irish Parliament, who had withdrawn from it after the outbreak of the rebellion,[15] and several of these men took active part in the establishment of the Confederation. In June, 1642, the remaining members of the Irish House of Commons expelled some forty of the absentees who were "in open rebellion" or "indicted of high treason," adjudging them to be "rotten and unprofitable members, fit to be cut off" and

ordering that their seats be filled by new elections.[16] Thereafter the Irish Parliament was a sectional assembly, from which Catholics were barred.[17] The championship of the Irish national cause passed from Dublin to Kilkenny.

The Kilkenny Assembly established a Supreme Council, to consist of twenty-four members appointed by the Assembly, with subordinate provincial and county councils. It decreed that the Catholic Church should enjoy all the privileges guaranteed to it by Magna Carta, and that the common law of England and all statutes of force in Ireland, which were not contrary to "the Catholick Roman religion, or the liberties of the natives, and other liberties of this kingdon," should be observed. All persons were to bear true allegiance to the King, and an oath of association or union was to be taken in the parish churches after confession and the reception of the sacrament. Evidence of the influence of lawyers in the Assembly appears in an ordinance providing for the establishment of "one Inns of Court" in order that "the laudable laws of England and Ireland may not die amidst the disasters of these times."[18] Patrick Darcy seems to have been the most distinguished lawyer in the Assembly, for when a committee was appointed to frame a "model of civil government" its members were instructed to call upon him for assistance.[19] He was a member of the Supreme Council throughout the history of the Confederation, which lasted till 1649. The work of the Confederate Catholics is thus summarized by John T. Gilbert, a diligent student of their records: "Declaring by public oath their allegiance to the King, but resisting the authority of the

English Parliament, the Confederates, through their Supreme Council, organized forces, nominated commanders and officials, collected the public revenue, levied taxes, minted coin, treated with foreign powers, and governed a considerable part of Ireland.'' [20]

* * *

We have now to see what position the Confederation took on Anglo-Irish constitutional relations. In the archives of the Franciscans of the Irish Province there is an anonymous volume, printed in small quarto, without date or name of printer; according to a note in contemporary handwriting on the title-page it was printed at Lille in January, 1643. It is entitled *Manifeste et Articles que les Catholiques Confederez d'Hibernie demandent en toute humilité, au Serenissime Charles leur Roy, pour trouver une bonne Voye d'Accord*,[21] and probably relates to terms formulated by the Confederates in connection with an unsuccessful overture for negotiations with the King in 1642. In this document it was emphatically denied that the English Parliament possessed any lawful authority over Ireland, and a constitutional status was claimed for Ireland coordinate with that of Scotland. After specifying a number of desired reforms the Confederates said:

Enfin, nous demandons humblement, que ces articles soyent . . . . distinctement confirmez par sa Majesté, et par nostre Parlement d'Hibernie, ne reconnaissans aucune subjection ou subordination à aucun autre Parlement, soit d'Angleterre, soit d'Escosse, comme l'Escosse ne recognoit point celuy d'Angleterre, ains seulement à sa Majesté, à son Conseil privé, et à nostre Parlement procedant juridique-

ment et selon nos coustumes, et enfin, à nos Conseils d'Hibernie.

On March 17, 1643, agents appointed by the Supreme Council met commissioners of the King at Trim and presented to them a "Remonstrance of Grievances" to be transmitted to him.[22] In a memorial sent in advance of the meeting to the Marquess of Ormonde, one of his commissioners and commander-in-chief of his forces in Ireland, the King gave his opinions on certain demands which the Confederates would probably make in their propositions for peace. One of these was: "That Ireland should not be obliged by any statute made in England, which shall not be confirmed by their Parliament, nor be commanded by orders of the Parliament of England." The King seems to have been not unsympathetic toward this demand, though conditions in England — the Civil War was then in progress — made it inexpedient for him to appear to support the constitutional claims of Irish Catholics against the Puritan imperialism of the Long Parliament, for he said: "They may have much to say for themselves in this point; but this caution must be observed, both in respect of the president [sic], and the influence it may have upon his Majestie's affairs here, [that] what shall be agreed upon concerning the same, be admitted by way of declaration of what is their right, not as granted *de novo*." [23]

The King was correct in his surmise that the Confederates would insist upon the legislative independence of Ireland. One of the grievances specified in their Remonstrance was that the "malignant party" [24] in the English Parliament,

then in arms against the King, had declared "that Ireland was bound by Statutes made in England, if named," which, they said, was "*contrary to the known Truth, and the Laws settled here for 400 years.*" In Article X of the Remonstrance they declared:

That whereas Ireland *has a Parliament of its own, and no Statute made in* England *ought to bind in* Ireland, *unless there established by Parliament; yet by several late Acts, your Majesty's Subjects unsummoned, unheard, were declared Rebels, and two millions and a half of Acres of their Lands sold to the Undertakers; which Acts they conceive to have been forced upon your Majesty, because unjust and destructive, the Scope seeming to aim at Rebels only, and the disposition of a certain quantity of Land, but in effect and substance,* all the Lands in the Kingdom *may thereby be distributed. By colour whereof the Forces sent hither* Disavow *Authority from your Majesty, but depend upon the Parliament of England.*

The Protestants of Ireland, learning of the Confederates' Remonstrance, drew up answers to its several articles.[25] Though attributing the worst of motives to the Catholics and denying the reality of most of their alleged grievances, the Protestants did not commit themselves unreservedly to the constitutional doctrine that the English Parliament had a right to legislate for Ireland. They could not have done so with very good grace, since the representatives of both religions in the Irish Parliament had united to deny that right less than two years before. "Whether Laws made in *England* will *bind in Ireland,* if Ireland named [sic]," the Protestants said, "is a point concerns [sic] the *Protestants* of *Ireland* as much as *Papists,* and being only

talk'd of, might more fitly have been disputed in Civil Assemblies, than by *Arms* and open Hostility against Your Majesty, and the Resolution written in the Blood of so many Thousand Protestants." In answer to Article X they said: "How far Laws made in *England* may *bind* in *Ireland*, will best appear by Records and Precedents." They denied, however, that the Confiscation Act had been forced upon the King, and, without expressly affirming the right of the English Parliament to interfere in Irish affairs, declared that it had been passed as the best means of relieving the King's despoiled Irish Protestant subjects.

Soon after the meeting at Trim the King instructed Ormonde to treat with the Catholics for a year's truce and, if successful in securing it, to bring his army over to England. The Confederates were at one with the King in thinking that the forces which had been used against themselves might be more profitably employed in fighting the English Puritans, and "articles of cessation" were signed in September, 1643. The English Puritan pot expressed its opinion of the Irish Catholic kettle when the Long Parliament protested against the cessation on the ground that it would make it possible for "the Papists and Rebells of Ireland to help the faction against religion here."[26] Even if he had desired to do so, the King was never in a position to renew the war in Ireland, and the truce was extended by subsequent agreements. At length, in January, 1649, less than a month before the execution of Charles, a treaty of peace was agreed upon by Ormonde and the General Assem-

bly at Kilkenny, whereby the Confederates secured most of what they had been contending for.[27]

Throughout the protracted negotiations of these years the Confederates never wavered in their insistence upon the legislative independence of Ireland. In March, 1644, propositions formulated by the General Assembly, in pursuance of the Remonstrance delivered at Trim, were presented to the King at Oxford.[28] Number 11 of these was as follows:

That an Act shall be passed in the next Parliament, declaratorie that the Parliament of Ireland is a free Parliament of itselfe, independent of, and not subordinate to, the Parliament of England; and that the subjects of Ireland are immediately subject to your Majesty as in right of your Crowne; and that the members of the sayd Parliament of Ireland, and all other the subjects of Ireland are independent, and no way to be ordered or concluded by the Parliament of England, and are onely to be ordered and governed within that kingdome by your Majesty and such Governors as are or shall be there appointed, and by the Parliament of that kingdome according to the lawes of the land.[29]

To this the King answered:

His Majestie conceives the substance of this Proposition (which concernes the fundamentall rights of both kingdomes) fitt to be referred to the free debate and expostulation of the twoe Parliaments, when it shall please God that they may freely and safely sitt, his Majestie beinge soe equally concerned in the priviledges of either that hee will take care to the utmost of his power that they shall both contayne themselves within their proper limitts, his Majestie beinge the head and equally interested in the rights of both Parliaments.[30]

In September, 1644, during the course of negotiations between Ormonde and Confederate commissioners, the latter presented the same propositions that had been delivered to the King in the preceding March, whereupon a debate took place between Sir Richard Bolton, Lord Chancellor of Ireland, and assistants, on the one side, and the commissioners, on the other.[31] In the interchange of arguments on Proposition Number 11 both sides agreed that Ireland was not subject to the legislative authority of the English Parliament. The only real difference of opinion here was as to the necessity of declaring the Irish claim in the form of a statute. On the government side it was contended that a declaratory resolution of both Houses of the Irish Parliament would be sufficient, while the commissioners urged that since the King had given his assent to an act of the English Parliament purporting to bind Ireland, it was necessary that he should now approve an act of the Irish Parliament denying the English claim. Ormonde's answer to Number 11 was identical with that which the King had already given at Oxford. In explaining why this failed to satisfy them, the Confederates based their denial of the jurisdiction of the English Parliament over Ireland upon the fact that Ireland was not represented in that Parliament. They said:

> The said Catholicks do conceive and affirm in all cleerness, that the Parliament of Ireland is independent of the Parliament of England, without which independency this realme could be no kingdom nor any Parliaments here necessary, nor any subject of this kingdom sure of his estate, life, or liberty, other than at the will and pleasure

of a Parliament, wherein neither Lords, Knights, nor burgesses of this kingdom have place or vote, and which vowed the destruction of all or most of this nation, and unwarrantably assumed the power to dispose of their estates..... To draw this into any debate or question might prove of most dangerous consequence to this nation, and yet a declaration of the Parliament here, and an act as in the Proposition is set down, is humbly desired, in regard his Majesty was drawn to give the royall assent to the Acts of subscription.[32]

The subsequent course of negotiations between Ormonde and the Confederates makes it clear that on the issue of Irish legislative independence the King did not dissent in principle from the opinion of the Confederates, and that he was quite willing to have the Lords and Commons at Dublin embody this view in resolutions of their own. His objection to a declaratory act was based on considerations of expediency; he believed that his assent to such an act would injure his cause in England.[33] The Confederates eventually yielded on the point of a declaratory act, and in the articles of peace agreed upon by Ormonde and the General Assembly in January, 1649, it was provided "that as for and concerning the independency of the parliament of Ireland of the parliament of England, his majesty will leave both houses of parliament in this kingdome to make such declaration therein as shall be agreeable to the lawes of the kingdome of Ireland."[34]

But Anglo-Irish relations were not to be adjusted by parliamentary resolutions. In August, 1649, Cromwell landed in Dublin. *Inter arma silent leges.*

In April, 1644, while negotiations were in progress between the King and the Irish Confederates, an anonymous book in manuscript was brought to the attention of the Irish House of Lords and referred by them to the House of Commons with a view to holding a conference upon it. After it had been read in the Commons the House went into committee to discuss it, but before any action was taken Parliament was prorogued, and the Commons' Journals do not record any subsequent proceedings with respect to it.[35] The book in question was entitled *A Declaration setting forth how, and by what means, the Laws and Statutes of England, from time to time, came to be of Force in Ireland.* It was the most detailed defence that had yet appeared of the contention that Ireland was not subject to the legislative authority of the English Parliament, and the notice it received shows that it must have created something of a sensation. It elicited a long reply from Sir Samuel Mayart, an Englishman by birth and a Justice of the Court of Common Pleas of Ireland, who undertook to prove that Ireland was legally bound by Acts of the Parliament at Westminster.[36] Both of these writings, strangely enough, remained in manuscript for more than a hundred years, until, in 1750, they were published by Walter Harris as Part II of his *Hibernica.*[37] In one manuscript copy of the *Declaration* which Harris used the name of Sir Richard Bolton appeared as the author, but on the strength of the resemblance which the work bore to Darcy's *Argument,* referred to above, Harris thought it probable that it had been written by the latter.[38] Its authorship remains uncer-

tain. The *Declaration* and Mayart's *Answer* are not easy reading. They are dusty with dry gleanings from year books and statutes, and their authors lived long before Blackstone, in the words of Bentham, "taught jurisprudence to speak the language of the scholar and the gentleman." Yet these writings are entitled to an important place in the history of the long controversy over Anglo-Irish constitutional relations,[39] and it has been shown that they have significance for the student of the American Revolution.[40] They go, in fact, to the root of the question of the political structure of the British Empire, and they are deserving of more careful examination than they have received.

The author of the *Declaration* did not claim for Ireland the complete exemption from the jurisdiction of the English Parliament for which, seemingly, the Catholic Confederates were contending. Knowing that some English statutes had unquestionably been regarded as binding upon Ireland, he proceeded, with an advocate's ingenuity, to draw a distinction, with regard to their force in Ireland, between declaratory and introductory Acts of Parliament. The common law of England having been established in Ireland during the reign of King John, such English statutes enacted since then as were merely declaratory of the common law, were, he said, in force in Ireland of their own authority, without confirmation by the Parliament of Ireland. But — and this was his main thesis — English statutes which were "introductory and positive, making new laws, or any ways altering, adding unto, or diminishing the ancient Common Laws," were not binding upon

Ireland or in force there, he insisted, unless and until "enacted, allowed, and approved of, by act of Parliament in *Ireland.*" [41] In 1495, as was well known, it had been enacted that all statutes lately made in England relating to the public weal should thenceforth be in force in Ireland,[42] and this had been interpreted judicially to apply to all previous English statutes of this nature.[43] But this reception of English statute law was effected by Act of the Irish, not of the English, Parliament, and, of course, it did not extend to subsequent English statutes. With regard to the latter, other than those that were merely declaratory of the common law, the author said: "It is true, that since 10 *Hen.* 7. there have been many acts of Parliament made in *England* of great importance both for the government of the commonwealth, and the administration of justice between party and party, which are now of force in *Ireland*: but none of them were ever received as laws in *Ireland*, until the same were enacted by several Parliaments holden in *Ireland.*"[44] And likewise, with reference to times before 1495, he said that "none of the statutes made in *England* from the 12th year of King *John*, until 10 *Hen.* 7. (which were introductory or positive) have been received or put in execution, as laws, in the realm of *Ireland*, until the same were approved and enacted by several acts of Parliament in Ireland." [45]

To sustain his contention the author referred to certain medieval Irish statutes which confirmed earlier English statutes, assuming that none of the latter had been in force in Ireland before such confirmation.[46] It was undeniable

that acts had been passed in England from time to time, beginning in the thirteenth century, in which Ireland was specifically named, but most of these the author left out of consideration, and those which he mentioned were dismissed either as being declaratory acts or as never having been received or obeyed in Ireland.[47]

Many statutes, as we have seen, had been passed by the English Parliament, especially during the Tudor period, which mentioned the King's dominions in general and were clearly intended to apply to them. The author referred to a few of these enacted at the time of the Reformation, but he regarded them as *ultra vires* and nugatory, as far at least as their application to Ireland was concerned, and he said that they had not been received or in force there until subsequently enacted by the Parliament of Ireland.[48]

Twice during the Middle Ages, in the 19th year of Edward II and in the 29th of Henry VI, acts had been passed in Ireland, he said, declaring that English statutes should not be in force there unless approved and allowed by the Irish Parliament.[49] These acts, he admitted, were not to be found in the extant rolls of the Irish Parliament, but he undertook to explain this by saying that many records "miscarried in those troublesome and distempered times."

Mayart in his *Answer* denied that any valid distinction could be drawn between the power to enact declaratory laws and the power to enact introductory laws. Such a distinction he called "a difference without a diversity" and "a division of a thing, which is in truth indivisible." If the Parliament of England had the right to bind Ireland

by statutes of the one kind, as had been conceded in the *Declaration*, it had the right to bind it by statutes of the other kind.[50]

Having regard to the historical evolution of legislation in England, we may say, in comment, that some doubt may be entertained whether there could have been in the minds of medieval lawyers and legislators any such clear distinction between declaratory and introductory statutes as would have been necessary in order to determine, according to the theory of the author of the *Declaration*, which English statutes should, and which should not, be deemed to be in force in Ireland. In an interesting paper on "Magna Carta and Common Law," Professor McIlwain argues that medieval English statutes, in purpose and in essence, were declarations of pre-existing law, and that statutory changes in the law came about incidentally and gradually;[51] and elsewhere he says that the distinction between declaratory and introductory acts is a comparatively late one, that "conscious legislation" (i.e., the enactment of avowedly new law) is difficult to find much before the fifteenth century.[52] If this is a correct view of the origin of legislation in the modern sense, if the *making* of law grew gradually out of the *declaring* of law, it is apparent that the author of the *Declaration* was guilty of a fatal anachronism in supposing that a distinction between declaratory and introductory laws could have been employed by medieval Irish judges as a criterion for determining the binding force of English statutes in Ireland. It is only fair to say, however, that Mr. McIlwain's opinion has not commanded general

assent. In particular, it has been challenged by Mr. Theodore F. T. Plucknett in his *Statutes and their Interpretation in the First Half of the Fourteenth Century.*[53] On the basis of a careful study of the year books Mr. Plucknett concludes that there was conscious law-making during the period covered by his investigation, that statutes often altered the common law, and that this was recognized by contemporaries.[54] But if this was the case, the position of a medieval Irish judge, called upon to determine amidst the enactments of English statutes (which were not conveniently labeled as declaratory or introductory) which ones should be executed and which should not, would have been well-nigh hopeless. At any rate, it was for the author of the *Declaration* to show that such a practice was followed, but he gave no evidence whatever to indicate that Irish or English courts ever distinguished between English declaratory and introductory acts with regard to their binding force in Ireland.

In the *Declaration*, as we have seen, stress was laid upon the fact that English statutes were sometimes confirmed by the Irish Parliament as evidence that they had not been in force in Ireland prior to confirmation. It was not to be found in any record in Ireland, the author asserted, "that ever any Act of Parliament made in *England* since the time of King *John* [i.e., since the beginning of statute law], was by the judgment of any Court received for law, or put in execution in the realm of *Ireland*, before such time as the same was confirmed and established by Act of Parliament in *Ireland.*"[55] In support of this contention he referred

to an Irish statute of 13 Edward II (1320), which confirmed the English statutes of Merton and Marlborough (enacted under Henry III) and of Westminster I and II and Gloucester (enacted under Edward I).[56] Mayart exposed the fallacy of the assumption that the confirmation of a statute necessarily implied that it had not been in force previously,[57] and he showed from Irish court records that the English statutes confirmed by the Irish Parliament in 1320 had been executed in Ireland years before that date, and that other medieval English statutes had been enforced in Ireland before confirmation there.[58] He explained, moreover, how they were transmitted to Ireland.[59]

Historical scholarship has sustained Mayart's view. From time to time, during the Middle Ages, English statutes were sent to Ireland for enforcement there without reference to the Irish Parliament. The procedure in such cases was thus described by the record commissioners in their Introduction to the first volume of *The Statutes of the Realm*, published in 1810:

> In Ireland the Promulgation of such Statutes as were passed in England and transmitted to Ireland, was regularly made by means of a Transcript sent under Seal from England, with a Writ directed to the Chancellor of Ireland, requiring the same to be kept in the Chancery of that Kingdom, to be enrolled in the Rolls of the said Chancery, then to be exemplified under the Great Seal of Ireland, and sent unto and proclaimed in the several Courts and Counties throughout the kingdom. Sometimes the Writ was to the Justices, in Ireland, simply requiring Proclamation.[60]

Dr. Henry F. Berry in his authoritative edition of the

medieval Irish statutes, published in 1907, writes to the same effect:

Statutes made in England, which were to be observed in Ireland, were sent by means of a transcript under seal from England, to the Chancery of Ireland, with a writ for their enrollment directed to the Chancellor. From the Chancery, they were exemplified under the great seal of Ireland, and sent to the two Benches and the Exchequer, and they were frequently proclaimed in the counties. Sometimes the writ requiring proclamation was addressed to the Justiciar.[61]

It was in accordance with this procedure, in 1285, that Edward I's statutes of Westminster I and II, Gloucester, and Merchants were transmitted to Ireland to be proclaimed and observed there.[62] In a Parliament held at York in 1318 certain statutes were enacted for the benefit of the people of England and of Ireland, and the following writ was afterwards sent to Ireland:

The King to his Chancellor of Ireland, Greeting. Certain Statutes, by Us, in our Parliament lately called at York, with the Assent of the Prelates, Earls, Barons, and the whole Commonalty of our Realm there being, for the common weal of the People of the said Realm, and of our Land of Ireland, made, We do send to you signed under our Seal; Commanding that the same Statutes you do cause to be kept in our Chancery aforesaid, and in the Rolls of the same Chancery to be inrolled, and under our Seal which We use in Ireland, in form Patent to be exemplified; and to every our Courts in the Land aforesaid, and into every County of the same Land, to be sent, by our Writs under the said Seal; Commanding our Officers of those Courts and the Sheriffs of the said Counties, that the said Statutes before them they do cause to be published, and the same in all and singular their Articles, as much as to every of them

belongeth, to be firmly observed. Witness the King at Clarendon the tenth day of September, in the Fourteenth year &c. By the King himself.[63]

The principal argument in support of the legislative independence of Ireland advanced by the author of the *Declaration* is thus stripped of its claim to historicity and relegated to that field of pseudo-history which propagandists have ever found so fertile.[64]

With respect to the confirmation by the Irish Parliament of certain English ecclesiastical statutes of Henry VIII, in which the King's dominions in general were mentioned, Mayart said that this action had been taken not because it was necessary in order to give the statutes in question legal force in Ireland, but merely for the purpose of bringing them, in the most public manner possible, to the attention of the people of Ireland as laws that must be obeyed.[65]

Formal assertions of the legislative independence of Ireland, if such had actually been made by the Irish Parliament, as alleged by the author of the *Declaration*, would have been void, according to Mayart, for "every ordinary understanding man would perceive, that seeing the Parliaments in *England* did bind *Ireland*, Parliaments in *Ireland* could not bind *England*, or take away that power from them, which they had formerly over them."[66]

Upon a few occasions the question of Ireland's relation to the English Parliament had come under consideration in the English law courts. In 1441, in a suit later referred to as *Pilkington's Case*, two of the serjeants, Fortescue and Portington, in the course of argument, said that a tax

granted by the English Parliament would not bind Ireland. According to Fortescue, this was because Ireland was separate and distinct from the realm of England, while Portington thought that it was because Ireland was in the same position as the counties palatine of Chester and Durham, which, though not outside the realm, were not represented in the English Parliament.[67] The author of the *Declaration* supposed that Fortescue and Portington were delivering opinions as judges, and cited this case to show that "statutes made in *England* do not bind in *Ireland*, unless the same be approved and allowed of in the Parliament of *Ireland*."[68]

Another case of which the author made much was one that raised directly the question of the right of the English Parliament to legislate for Ireland. An English statute passed early in the reign of Henry VI provided that wool and certain other staple commodities should be exported from Ireland, as well as from England, only to Calais, then in the possession of the English King, and not to any foreign port, on penalty of forfeiture.[69] During the reign of Richard III certain merchants of Waterford consigned wool to Sluys in Flanders, but on the voyage the vessel put in at Calais, where the wool was seized on the ground that it had been exported illegally. The merchants petitioned the King in Council for restitution, and their bill was referred to all the judges in the Exchequer Chamber at Westminster. The opinion of the judges was that Ireland was not bound by English statutes because it was not represented in the English Parliament — "*quia non hic*

habent Milites parliamenti." But they held that the people of Ireland, being subjects of the King of England, were liable for breaches of English statutes committed outside of Ireland, and that they were subject on the high seas to the jurisdiction of the English Admiral.[70] They added that appeal lay by writ of error from judgments given in Ireland to the King's Bench in England. When, in the next term of court, the same case came again before them, Hussey, Chief Justice of the King's Bench, said that English statutes were binding on Ireland — "*le chief justice disoit que les estatutes faits en Engleterre liera ceux de Ireland*" — which, says the reporter, was not seriously disputed by the other judges, although some of them had been of contrary opinion in the preceding term in the Chief Justice's absence.[71] The author of the *Declaration* sought to discredit Hussey's opinion by a citation from Brooke's *Abridgment*, which, he said, implied that Ireland could not be bound except by its own Parliament, and by asserting that it was contrary to the opinion of the "judges" in *Pilkington's Case*, to the first opinion in the *Merchants of Waterford Case*, and to the "judgments" of numerous Parliaments in Ireland.[72] Apart, however, from the two alleged Acts of the Irish Parliament, referred to above,[73] which were not in the extant records, these "judgments" were merely Acts of the Irish Parliament confirming earlier Acts of the English Parliament.

In the case of the *Post-Nati* (Calvin's Case, 1608) the judges, according to Coke's report of that *cause célèbre*, were of opinion that Ireland, though a "distinct domin-

ion," might "by express words" be bound by Act of the English Parliament. This opinion they seem to have based partly upon the conquest of Ireland by Henry II, and partly upon the fact that appeal lay from the King's Bench in Ireland to the King's Bench in England.[74] To show that Ireland was a dominion separate and distinct from England Coke cited the first opinion in the *Merchants of Waterford Case*, viz., that the people of Ireland were not bound by English statutes because they did not send representatives to the English Parliament, and then proceeded to reconcile this with the doctrine of the supremacy of the English Parliament over Ireland by interjecting the following unwarranted gloss: "which is to be understood, unless they be especially named."[75] The author of the *Declaration* could not overlook Coke's dictum that Ireland, if named, was bound by English statutes, but he again took refuge in *Pilkington's Case*, the first opinion in the *Merchants of Waterford Case*, and "divers judgments of Parliament in *Ireland* to the contrary."[76] With respect to appeals from the Irish to the English King's Bench, it did not follow from this practice, he said, that the Irish Parliament was subordinate to the English Parliament, or that the latter might make new laws for Ireland, "for if a writ of error be brought in *England* to reverse a judgment given in the King's Bench of *Ireland*, the Judges of *England* are not to alter or change the laws of *Ireland*, or to give judgment according to the laws in *England* in such case, but according to the laws in *Ireland*."[77]

Pilkington's Case gave Mayart no trouble. Although he,

too, mistook serjeants for judges, he pointed out that no one in the case had held that English statutes in general could not bind Ireland, and that there was no judgment to that effect. In fact, he was able to use the case as evidence that Ireland was subordinate to England, for here was an English court trying a suit in which plaintiff and defendant were disputing over an office in Ireland. "And if they in *England,*" he said, "have power to hold plea in the Courts of Justice there for things in *Ireland,* as by this case it appears they have, doubtless *Ireland* is bound by the judgments of the Courts of Justice in *England,* or otherwise it would have been ridiculous in them to hold pleas of things with which they had nothing to do, and of which, if they had given judgment, they could not award execution." [78]

Nor did the *Merchants of Waterford Case* present any greater difficulty. The fact that the other judges did not dissent from Hussey's opinion showed, Mayart urged, that when they had given further thought to the case "they changed their opinions, and upon serious consideration thought, that the statutes of *England* did bind them of *Ireland.*" The author of the *Declaration,* he said, had misinterpreted the passage in Brooke's *Abridgment* for the purpose of discrediting the Chief Justice's opinion.[79]

The right of the King's Bench in England to reverse judgments of the King's Bench in Ireland, a right which was not disputed, was incompatible, Mayart argued, with the legislative independence of Ireland. For if an ordinary court of justice in England had appellate jurisdiction over Ireland, it followed, *a fortiori,* that the Parliament of

England, the supreme court of justice, had authority over it. If Ireland were an independent state, "the writ of Error of a judgment given in the King's Bench in *Ireland,* ought to be returnable only in the Parliament of Ireland, and not in the King's Bench in *England.*" The fact that in cases of appeal from Ireland the English court gave judgment according to the law of Ireland could not properly be advanced as an argument to show that Ireland was not subordinate to England, for "to have power to declare what the law is, and to cause it to be executed, as it is declared, is the most sure and undeniable argument of power in them that command, and of subordination in them that obey, that can be." [80]

The origin of the authority of the English King over Ireland and the introduction of English law into that land were so interpreted by the author of the *Declaration* as to give support to his thesis. He denied that the conquest of Ireland by Henry II had had the effect of annexing or subordinating Ireland to the kingdom of England, and he referred to a grant said to have been made by Henry to his son John to show that even if Ireland had been annexed, it would have been wholly separated from England by this grant. For John, according to the author, received Ireland from his father as an independent kingdom, and thereafter ruled over it as an "absolute Lord," or independent prince, with the title of "Dominus Hiberniae." Subsequently, after his succession to the English throne upon the death of his elder brother Richard, he "established the government of *Ireland* to be according to the laws of *England,*" but he

did this, the author insisted, as Lord of Ireland, not as King of England. He might have established the laws of Scotland in Ireland if he had so willed, but this would not have subordinated Ireland to Scotland or made it in any way subject to the jurisdiction of the Scottish Parliament.[81]

Mayart thought it probable that Henry II had conferred some sort of authority over Ireland upon John, but he showed that there was no good evidence to indicate that he had thereby made him an independent king.[82] He pointed out that Prince Edward, son of Henry III, received Ireland by grant from his father without becoming an independent ruler in consequence, and he said there was no reason for believing that John received any greater power from Henry II than that which was later conferred upon Edward by Henry III.[83] Moreover, it was not John, according to Mayart, but Henry II, who first introduced the laws of England into Ireland. This was contrary to Coke's statement in *Calvin's Case*, but to support his opinion Mayart referred to grants of land in Ireland made during Henry's reign "according to the laws of England," to a passage in Matthew Paris to the effect that English laws were received at an Irish council summoned by Henry, and to a Declaration adopted by both Houses of the Irish Parliament in 1641, in which it was said that the common law was received and established in Ireland during Henry's reign.[84] After becoming King of England, John, said Mayart, "confirmed and regulated the laws in Ireland," but in doing so he was acting by virtue of the authority over Ireland inherited

from his brother Richard, not by reason of any grant made to him by his father.[85]

Having "proved" from precedent that the Parliament of England had no right to legislate for Ireland, the author of the *Declaration* set forth what he called the "inconveniencies" that might ensue if it possessed such a right. In that case a statute passed by the English Parliament, which could not know conditions in Ireland as well as those who lived there, might repeal or alter all laws made in Ireland, "which were a thing marvellous inconvenient for that Kingdom." If laws to contrary effect were passed simultaneously by the two Parliaments, there would be uncertainty as to which should be obeyed in Ireland. Moreover, it would be contrary to fundamental rights and liberties for the English Parliament to make laws for Ireland, "for by the rules of reason and politic government, to all Statute Laws, whereby the whole Commonwealth is to be governed, the members thereof are to give assent."[86] But the *argumentum ab inconvenienti* and claims based upon fundamental law were not basic in the *Declaration*; they were used, rather, to buttress the argument from precedent, which was the foundation of the structure.[87]

The charge that legislation without representation was a violation of fundamental rights and the law of reason Mayart met with a statement of the theory of virtual representation. Ireland, he said, was a part of the English commonwealth, and it was necessary that every statute to bind the commonwealth should have the assent of King,

Lords and Commons. It was not necessary, however, "to have Knights and Burgesses from every Seigniorie, Dominion, or County; but the assent of the three estates in Parliament, there met together, shall bind all the members of the Crown of *England*, and all others who are subject to their power." [88] Here again history was on Mayart's side, and he had no difficulty in showing that Parliament had often legislated for territories that sent no representatives to Westminster. The idea that parliamentary jurisdiction is restricted to those geographical areas in which members of the House of Commons are elected is one that has been advanced at different times and in behalf of different political communities within the Empire, but the weight of precedent has always been against it. This is not to say that resistance to the exercise of parliamentary authority has never been justified, but merely that justification must rest on other grounds than that of precedent.

No action or policy, of course, is ever justified by precedent alone. "Men of sense," said Burke, "when new projects come before them, always think a discourse proving the mere right or mere power of acting in the manner proposed, to be no more than a very unpleasant way of misspending time." But Mayart had none of that "prudence" which Burke ranked as the first of political virtues; it is a quality found rarely enough in the most favorable environment, and not to be looked for at a time when the passions of men were inflamed by civil war and religious hatred. When he urged that it was *expedient* for the English Parliament to legislate for Ireland, he was writing as

an English Protestant, and his reasoning would appear convincing only to those who shared his preconceptions. His statesmanship can be gauged by his remark that "it is not now to be doubted, but they better know in *England* what Laws are in truth fit for them [the Irish], than they themselves do; and if ever they [the English Parliament] had cause, now they have, to maintain their right and power over them, which in all times heretofore they have had." [89]

Throughout his *Answer*, however, Mayart gave evidence of legal learning much more extensive than that shown by the author of the *Declaration*, and of superior powers of reasoning. At every critical point he took issue with his opponent, and as far as precedents were concerned, his refutation was in most cases overwhelming. But his tract, as has been said, was not published until 1750, and little seems to have been known of the arguments which it presented. The *Declaration* also remained in manuscript until the same time, but several copies of it were made in 1644 by order of the Irish House of Commons,[90] and there is no doubt that it had an important influence. There is conclusive internal evidence to show that it was used extensively by Molyneux in his famous patriotic pamphlet that will be discussed later; and it is almost certain that Molyneux would not have written as he did if Mayart's *Answer* had been known to the public of his day.

* * *

On the eve of the Rebellion of 1641 Irish Catholics and Protestants, as we have seen, had joined in denying the authority of the English Parliament over their country.

But the bitter civil strife that followed intensified the religious cleavage and made impossible for years to come a united Irish resistance to English imperialism. So long as the Protestants of Ireland, to whom alone participation in politics was permitted, looked upon Rome and their Catholic fellow-countrymen as a more serious and imminent peril than Westminster, a comprehensive and articulate Irish patriotism was out of the question. During the Interregnum the Irish Parliament, even as a dependent and wholly Protestant assembly, ceased to exist, Ireland was joined to England in a legislative union that rested upon the sword of Cromwell, and Irish representatives, Protestants, of course, sat in the Protector's Parliaments at Westminster. In the Puritan scheme of politics there was room for only one Parliament and one patriotism in the British Isles.

With the Restoration the political innovations of the Puritans were swept away. The short-lived parliamentary union of England, Scotland and Ireland came to an end, and the old form of government was restored in each of the three kingdoms. Charles II was proclaimed King at Westminster on May 8, 1660, and at Dublin six days later. By the first act of the only Irish Parliament that he summoned, which lasted from 1661 to 1666, it was declared that he was entitled to the Crown of Ireland by "lawful descent and inheritance," having succeeded thereto immediately upon the decease of his father,[91] and in Ireland, as in England, his succession to the throne was dated retroactively from

that event. No other reckoning would have been consistent with the rule of Irish law that the Crown of Ireland was inseparably annexed to that of England.

During the reign of Charles II the English Parliament occasionally enacted laws relating to Ireland. The Navigation Act of 1660, for example, required bond to be given for every vessel sailing from England, Ireland, Wales or Berwick to any of the English colonies, to secure that if the vessel loaded any of the colonial products enumerated in the act, they should be brought to some port of England, Ireland, Wales or Berwick.[92] Another statute of the same year, passed in the interest of English woolen manufacturers, who feared foreign competition, prohibited the exportation of sheep, wool, woolfells, woolen yarn and fuller's earth from England, Wales, Berwick, the Channel Islands and Ireland to any foreign country,[93] and for the better enforcement of the act it was provided by statute in 1662 that violation should be adjudged a felony.[94] In 1660 Parliament forbade the planting of tobacco in England, Wales, the Channel Islands, Berwick and Ireland, under penalty of fine and forfeiture of the crop,[95] but notwithstanding, tobacco continued to be raised extensively in the southern counties of England, and an additional fine for violation of the law was imposed by an act of 1663, which likewise applied to Ireland.[96] It is evident, then, that the right to legislate for Ireland was regarded by English lawyers and politicians of the Restoration as vested in the English Parliament by prescription, not as a revolutionary

Puritan innovation, and it is not recorded that any protest was made against any of these English statutes by the Irish Parliament of Charles II.

The Revolution of 1689, as it affected Ireland, cannot be reconciled with the claim that had been made in the past, and was often to be reiterated by Irish patriots, that Ireland, like Scotland, was a kingdom coordinate with England. The English Convention Parliament did not presume to dispose of the Crown of Scotland, which was offered to William and Mary by a separate and independent Scottish Convention Parliament. But, as is set forth in the Bill of Rights, it resolved that "William and Mary, Prince and Princess of Orange, be and be declared King and Queen of England, France and Ireland and the dominions thereunto belonging," and the new sovereigns "did accept the crown and royal dignity of the kingdoms of England, France and Ireland and the dominions thereunto belonging, according to the resolution and desire of the said lords and commons." [97] Ireland had no more voice in this momentous transaction than did "the dominions thereunto belonging." The first Irish Parliament of William and Mary met in 1692, and by its first act recognized their right to the Crown of Ireland. After reciting that Ireland was "annexed and united to the imperial crown of England" and that the Kings and Queens of England were "by undoubted right" Kings and Queens of Ireland, the statute acknowledged that William and Mary "were, are, and of right ought to be King and Queen of England, Ireland, Scotland and France, and the dominions and territories thereunto belonging." [98]

The Irish Parliament thus took the position that William and Mary became King and Queen of Ireland when and because they became King and Queen of England,[99] and thereby virtually recognized that Ireland was bound by the action of the English Convention Parliament. That action, of course, was revolutionary, and the Irish Catholics who remained loyal to James II were logically justified in regarding it as void. But it is impossible to attribute consistence to the Irish Protestants — the "Williamites" — who accepted the Revolution settlement and yet insisted that Ireland was an independent kingdom.

It was the sword, however, and not the resolution of the Convention Parliament that really decided who should rule over Ireland. Before the military decision was reached a Parliament was held at Dublin under unique conditions. A few months after his flight to France, James II, as is well known, set out with French aid to establish himself in Ireland as preliminary to the recovery of the English throne. The Catholic Earl of Tyrconnel, whom he had appointed Lord Deputy of Ireland in 1687, had carried out a thoroughgoing reorganization of the government and army of Ireland in the Catholic interest, and had reconstructed the municipal corporations, previously controlled by Protestants, so as to insure a Catholic majority in the next House of Commons. Protestants in large numbers fled from the country, taking refuge in England and Scotland. James landed in Ireland in March, 1689, and caused writs to be issued for a Parliament to meet in May, though Poynings' Law had forbidden the summoning of any Parliament in

Ireland without the permission of the King and Council in England. In the House of Commons Catholics were in an overwhelming majority, and the flight of Protestant peers and bishops gave them control of the House of Lords as well. During a session that lasted only a little more than two months (May 7-July 20) sweeping anti-Protestant and anti-English legislation was enacted, some of it against the personal wishes of James. By one act all titles to Irish lands acquired since the outbreak of the Rebellion of 1641 were declared to be invalid and the lands restored to the representatives of those who had been in possession on October 22, 1641; by another, hundreds of Irish Protestants were attainted of treason. From the constitutional point of view the most important of the thirty-five statutes that were passed was "An Act declaring that the Parliament of England cannot bind Ireland, and against Writs of Error and Appeals, to be brought for removing Judgments, Decrees, and Sentences given in Ireland, into England."[100] This was, in effect, a declaration that Ireland was independent of the English Parliament and courts, and may fairly be regarded as an expression of the opinion and will of Catholic Ireland. So far as legislation was concerned, it embodied the doctrine that had been enunciated in the *Declaration* of 1644 (with which, in all probability, some members of the Parliament were acquainted), except that no distinction was drawn between English declaratory and introductory acts as to their effect upon Ireland. The assertion that Ireland had always been a kingdom distinct from England, and that no Acts of the English Parliament

had ever been binding on Ireland unless re-enacted by the Irish Parliament, was followed by the provision "that no Act of Parliament passed, or to be passed in the Parliament of *England*, though Ireland should be therein mentioned, can be, or shall be any way binding in *Ireland*; Excepting such Acts passed, or to be passed in *England*, as are or shall be made into Law by the Parliament of *Ireland*"; and it was made a high misdemeanor for any person to plead to the contrary before any court in Ireland. As to judicial independence, appeals from Irish to English courts, including the House of Lords, were forbidden. It was provided that appeal should lie from the King's Bench in Ireland to the Justices of the Common Pleas and the Barons of the Exchequer, sitting in the Exchequer Chamber in Ireland, and thence to the High Court of Parliament (i.e., the House of Lords) in Ireland. It is not surprising that a bill was passed to repeal Poynings' Law, since that act deprived the Irish Parliament of direct legislative initiative, but this was rejected by James.[101]

The English Parliament lost no time in dealing with this Irish Parliament and all its works. In an act "for the better Security and Relief of their Majesties' Protestant Subjects of Ireland" [102] reference was made to the recent meeting at Dublin of "several persons .... pretending to be or calling themselves by the name of a Parliament" and to the passing by this "rebellious assembly" of "several pretended Acts or Statutes in manifest opposition to the Sovereignty .... of the Crown of this Realm and to the general Prejudice and Violation of the Rights and Properties of their

Majesties' good Subjects of that Kingdom''; and it was declared that the Dublin assembly was not a Parliament and that all of its acts and proceedings were ''absolutely null and void to all intents, constructions and purposes whatsoever.'' By the same statute all proceedings against the Irish corporations during the reign of James II were declared to be void, and other enactments were made in the interest of the Irish Protestants. The second Irish Parliament of William and Mary, held in 1695, expressed its unqualified approval of this nullifying English statute and ordered the destruction of all records of the ''pretended'' Parliament of 1689.[103] According to Molyneux, soon to become the foremost opponent of English legislation for Ireland, the English act that has just been mentioned was passed at the request of Irish Protestant refugees in England, of whom he was one, and he tried to show that it ought to be regarded as an emergency measure, necessitated by the hostilities then in progress in Ireland, which forbade the holding of an Irish Parliament, and not as a precedent for the right of the English Parliament to legislate for Ireland.[104]

Other English statutes of William and Mary relating to Ireland which Molyneux regarded as dictated by necessity and obeyed voluntarily by the Protestants of that country were ''An Act for Relief of the Protestant Irish Clergy'' [105] and ''An Act for Prohibiting all Trade and Commerce with France,'' [106] both passed in 1689, when it was impossible to hold a Parliament in Ireland under authority of the new sovereigns. The former suspended an Irish statute of

Charles II,[107] which had made it illegal for any person holding an ecclesiastical benefice in England or Wales to enjoy any benefice in Ireland, provided that no Irish Protestant clergyman who had been forced to flee from Ireland and inducted to any benefice in England should for that reason be deprived of any benefice in Ireland, "any Law, Statute or Canon notwithstanding," and prescribed how such clergyman should make his claim in Ireland. The latter prohibited the importation of French products into England, Ireland, Wales, Berwick, the Channel Islands or the Isle of Man.

By an act passed in the first Irish Parliament of Elizabeth's reign certain classes of persons in Ireland, but not members of Parliament, were required to take the oath of supremacy contained in the act.[108] In 1691 the English Parliament repealed this Irish statute so far as it related to the oath, substituted therefor other oaths and declarations, and required that they be taken and subscribed to by all members of the Irish Parliament and by other specified classes of persons in Ireland.[109] This English act was accepted without demur by the first Irish Parliament of William and Mary, and the new oaths, which excluded Catholics, were duly taken by its members.[110]

Men are not inclined to object very vehemently on constitutional grounds to laws that operate to their own advantage, and it is unlikely that Irish Protestants would have made loud outcry against the intervention of the English Parliament in Irish affairs if it had been confined to legislation in their interest.[111] But this was not the case. Between

the Restoration and the Revolution an important woolen industry grew up in Ireland, carried on mainly by Protestants, and Irish woolens came to compete with English woolens in foreign markets. By an English statute of 1698, passed in the interest of English manufacturers, the exportation of wool and woolen goods from Ireland to any foreign country was prohibited under penalty of a heavy fine, careful regulations were made for the enforcement of the law, and the judges of Ireland were required to take account of its due execution throughout their circuits and to inform the Lord Lieutenant of all cases of its violation.[112] The economic and ethical aspects of this law need not concern us, though it may be said that it ruined the most promising Irish industry and drove thousands of Irish Protestants to emigration.

* * *

While the bill was pending in the House of Commons there was published in Dublin a pamphlet by William Molyneux, a member of the Irish Parliament, entitled *The Case of Ireland being bound by Acts of Parliament in England, stated.* The author, like many other Irish Protestants, had taken refuge in England during the Tyrconnel régime and returned to Ireland after the collapse of the Catholic cause there. He was a zealous supporter of the Glorious Revolution and dedicated his book to King William. His purpose in writing it was to prove that the English Parliament had no right to legislate for Ireland, and in his use and abuse of history, his selection and his neglect of precedents, he reproduced, without acknowledgment, the main contentions

of the *Declaration* of 1644 with a fidelity that exposes him to the charge of plagiarism. But that anonymous tract seems to have been unknown to his readers, and he acquired with his fellow-countrymen an unrivaled reputation not only as a paragon of patriotism, but also as an oracle of history, and modern historians have spoken with respect of his pamphlet.[113] In so far as he traverses the ground covered by the *Declaration* what has been said in criticism of its arguments applies equally to his and makes discussion of them unnecessary.

In political theory Molyneux was a disciple of John Locke, and as such he naturally laid greater stress upon the law of nature and the rights of man than the author of the *Declaration* had done. The liberties of Englishmen, he asserts, are founded on "that universal *law* of *nature* that ought to prevail throughout the whole world, *of being governed only by such laws to which they give their own consent by their representatives in parliament.*" Since by inherent right, based on the law of nature and reason, men are subject to such laws only as they have consented to, it follows that it is "against reason and the common rights of all mankind for Ireland to be bound by Acts of the English Parliament.[114]

Molyneux was obliged to say something of English statutes applying to Ireland that had been passed within living memory. Those of Charles II's reign he dismissed as "innovations," unwarranted by precedent, for previously, such was his amazing statement, there was not a single "positive full precedent" in the whole statute book of an

Act of the English Parliament (other than declaratory acts) binding Ireland.[115] He admitted that the Irish Protestants had willingly obeyed the English statutes of William and Mary passed in their own interest, but submission to these, he insisted, was to be deemed purely voluntary. "If a man who has no *jurisdiction* over me, *command* me to do a thing that is pleasing to me, and I do it; it will not hence follow, that thereby he obtains an *authority* over me, and that ever hereafter I must obey him of *duty*." [116]

In attempting to reconcile the judicial procedure of appeal from the King's Bench in Ireland to the King's Bench in England with the claim that Ireland was not subject to the English Parliament, Molyneux followed the *Declaration*, but he contributed some reflections of his own that suggest an analogy which is not helpful to his case. Appeals to the King's Bench in England, he said, are appeals to the King, who is King of Ireland as well as of England; and it is not from the country where the court is held but from "the *presence* and *authority* of the king" that the pre-eminence of the jurisdiction flows. "I question not," he continued, "but in former times, when these courts were first erected, and when the king exerted a greater power in judicature than he does now, and he used to sit in his own court, that if he had travelled into Ireland, and the court had followed him thither; erroneous judgments might have been removed *from England* before him *into his court in Ireland*. . . . . From hence it appears, that all the jurisdiction, that the king's-bench in England, has over the king's-bench in Ireland, arises *only* from the *king's presence* in the

former.''[117] Here is a fruitful surmise, though one that a skillful pleader should not have indulged in. For precisely the same reason that Molyneux offered to account for the superiority of the English to the Irish court can be advanced to explain the superiority of the Parliament at Westminster to that at Dublin. The Parliament in England, like the King's Bench in England, was the King's court, its jurisdiction came from him, and the Kings of England sat in person in their Parliaments long after they had ceased to attend sessions of the Court of King's Bench. If the presence of the King gave the King's Bench in England jurisdiction over the King's Bench in Ireland, why did not the Parliament in which he habitually sat have jurisdiction over the Parliament in which he never sat? Molyneux seems to have realized that this question would naturally suggest itself to his readers, and in order to guard against their drawing an analogy that would be disastrous to his argument, he resorted to the following bad history and bad law: ''But if this be the ground of the jurisdiction of the king's-bench in England over the king's-bench in Ireland, (as I am fully perswaded it is) the parliament in England cannot from hence claim any right of jurisdiction in Ireland, because they claim a *jurisdiction of their own*; and their court is not the *king's court*, in that *proper* and *strict* sense that the *king's-bench* is.''[118] Except in times of revolution the Houses of Parliament had never claimed a legislative authority of their own apart from the King, and the bills that they passed had no legal force whatever until they received his assent and were

formally enacted in his name. Nor, when Molyneux wrote, was the King's assent a foregone conclusion, for the royal veto had not yet fallen into disuse.

A committee of the English House of Commons, to which Molyneux's pamphlet was referred, found a number of passages that tended "to the disowning and denying the Authority of the Parliament of *England* over *Ireland*," and the House resolved that the book was "of dangerous Consequence to the Crown and People of *England*, by denying the Authority of the King and Parliament of *England*, to bind the Kingdom and People of *Ireland*." In an address to the King, drawn up by the committee and approved by the House in June, 1698, certain recent proceedings in the Irish Parliament were reprobated, as having occasioned the "bold and pernicious" assertions contained in the pamphlet, and the King was asked "to discourage all things, which may, in any Degree, tend to lessen the Dependence of *Ireland* upon *England*." [119] Molyneux died before the end of 1698. It was Macaulay's opinion that he would probably have been impeached if he had lived a few months longer.[120]

William Atwood, an English barrister and a zealous champion of the rights of the English Parliament, at once entered the lists against Molyneux with a pamphlet published in 1698 and dedicated to the House of Commons, entitled *The History, and Reasons, of the Dependency of Ireland upon the Imperial Crown of the Kingdom of England, rectifying Mr. Molyneux's State of the Case of Ireland's being bound by Acts of Parliament in England.*[121]

He made use of several of the same arguments that Mayart had advanced half a century before, but the latter's work, it will be recalled, had not yet been printed, and it is unlikely that he had seen it. Like Mayart he denied that Henry II, by his grant to John, had made Ireland an independent kingdom, and he knew that medieval English statutes had been transmitted to Ireland for record and enforcement there, without confirmation by the Parliament of Ireland.[122] Molyneux, while admitting that whoever was King of England was also, *ipso facto*, King of Ireland, had asserted that English statutes relating to the royal succession and recognition of the King's title were not effective in Ireland until enacted by the Irish Parliament.[123] This was a fatal contradiction, as Atwood showed. "If a *King* of *England, as such,*" he said, "is *ipso facto King* of *Ireland,* is he not so before any Act of Recognition there? And if so, what can that, or other Acts repeating the Laws made in *England,* signify more, than a full publication of what was the Law before?"[124] More than once, moreover, the succession to the throne had been regulated by Acts of the English Parliament, and Ireland had been bound thereby, though it was not expressly named in these acts, and though they had not been "received" by any Parliament in Ireland.[125]

If Atwood found any open-minded readers in Ireland, they must have set Molyneux's book down for what it was — a tissue of error, contradiction and fallacy. But patriotism and the historical mind go ill together. Molyneux told his fellow countrymen what they wished to hear,

and their will to believe him was not to be shaken by any facts that might be offered by apologists for English tyranny. Like reformers generally they were not content to rest their case on justice and expediency alone. History had to be falsified to make a good cause look old.

Another reply to Molyneux, also published in 1698, was *A Vindication of the Parliament of England, in answer to a Book written by William Molyneux of Dublin, Esq.* The author, John Cary, was one of the foremost English merchants and mercantilists of his day. In his well-known *Essay on Trade* he had urged that Parliament should place restraints upon the exportation of Irish wool in the interest of the woolen manufacturers of England, and so had been led to "intermeddle," as he expressed it, in legal matters. Though not deeply versed in legal history, he was able to expose some of Molyneux's mistakes and bad reasoning. He was not, however, content to justify the authority of the English Parliament over Ireland by precedent alone, but insisted that it was perfectly consistent with Irish freedom. To make this seeming paradox look plausible he offered an analogy that raises some question as to his candor. The people of Ireland, he found, were in the same situation as an Englishman who was prevented from voting by going on a voyage. "For I believe you will grant," he said, "that if a Man denies or neglects to qualifie himself for such an Election, or if qualified refuses to be present thereat, or removes himself at such a distance that he cannot if he would, this Man is not denied his Consent, nor is his Liberty broken in upon, though he be afterwards bound up by

Laws made by a Parliament, in the Election of whose members he actually gave no Vote."[126] According to this theory of virtual representation, Ireland was to be regarded as a nation of perpetual voyagers![127]

* * *

Molyneux made the point that the English Parliament had never expressly asserted that it had the right to bind Ireland. Such an assertion, in the most emphatic and sweeping language, was made not very many years afterwards in consequence of a head-on collision between the Irish and the English House of Lords over the question of appellate jurisdiction.

From the Middle Ages onward to the eighteenth century the House of Lords in Ireland heard appeals from Irish courts, though its appellate jurisdiction was not exclusive or final. Appeals were often taken from the King's Bench in Ireland to the King's Bench in England, perhaps because Parliaments were held irregularly and infrequently in Ireland; and when they were taken to the Irish House of Lords ultimate appeal lay to the House of Lords in England. According to Sir Matthew Hale, writing during the reign of Charles II:

> If a judgment be given in the king's bench in Ireland, it is true a writ of error lies into the king's bench of England or in the parliament of Ireland; and if the judgment be affirmed or reversed in the parliament of Ireland, no writ of error lies in the king's bench of England upon such affirmance or reversal in the parliament there, but a writ of error lies in the parliament here upon such judgment given in the lords house of parliament in Ireland.[128]

Hale cited as authority for this opinion a fifteenth-century case, in which the King's Bench in England seems to have disclaimed authority to reverse an erroneous judgment of the Irish Lords on the ground that appeal lay from the latter only to the Lords in England. It does not appear from the record that the English Lords gave any judgment in this case, and Irish patriots of later times referred to it as evidence that the appellate jurisdiction of the Irish Lords was final.[129] They relied for their knowledge of the case, however, upon Prynne's *Animadversions* on Coke's *Fourth Institute*, and there is no reason to doubt that Prynne thought that the English House of Lords had supreme appellate jurisdiction.[130]

In the famous case of Annesley *v.* Sherlock the Irish House of Lords claimed for themselves *final* appellate jurisdiction, and the English House of Lords denied that they possessed *any* appellate jurisdiction. The suit, which concerned the possession of certain lands in Ireland, was begun in the Irish Court of Exchequer, where judgment was given in favor of Annesley; upon appeal by Hester Sherlock the Irish House of Lords reversed the judgment; and Annesley appealed to the English House of Lords. This was in 1717. Some twenty years before, the English Lords had held that certain proceedings in error before the Irish Lords were void, and that appeal lay directly from Irish courts to themselves, though prior to this the appellate jurisdiction of the Irish Lords does not seem to have been seriously questioned. The English House of Lords now refused to receive Annesley's appeal, on the

ground that in it complaint was made only of error in the judgment of the Irish Lords, and not of their want of jurisdiction. A second appeal, satisfactory in form, was received, and Hester Sherlock was ordered to answer as respondent. This she refused to do, and instead petitioned the Irish Lords, who, after taking the opinion of the Irish judges, claimed supreme appellate jurisdiction in the case and ordered the sheriff of County Kildare to put her in possession of the lands. After the sheriff had executed this order he was directed by the Irish Court of Exchequer, in pursuance of an order of the English House of Lords, to restore Annesley to possession, but he disobeyed and was heavily fined by the judges, who, in turn, were committed to prison by order of the Irish Lords. The English Lords resolved, "That the proceedings in this Cause which have been in the House of Lords in *Ireland* were *coram non Judice,* and null and void," and afterwards praised the Irish judges for their courage and ordered that the King be asked to confer upon them some mark of his favor to recompense them for the "ill usage" they had received by being "unjustly censured" and "illegally imprisoned" for doing their duty.[131] At the same time they ordered that a bill be brought in "for the better securing the Dependency of *Ireland* upon the Crown of *Great Britain.*" Such was the origin of the statute famous in Irish history as the Declaratory Act or "the sixth of George I."[132] It must be quoted in full:

Whereas the House of Lords of *Ireland* have of late, against Law, assumed to themselves a Power and Jurisdic-

tion to examine, correct, and amend the Judgments and Decrees of the Courts of Justice in the Kingdom of *Ireland*:

Therefore for the better securing of the Dependency of *Ireland* upon the Crown of *Great Britain*, May it please your most Excellent Majesty that it may be declared, and be it declared by the King's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, That the said Kingdom of *Ireland* hath been, is, and of Right ought to be subordinate unto and dependent upon the Imperial Crown of *Great Britain*, as being inseparably united and annexed thereunto; and that the King's Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons of *Great Britain* in Parliament assembled, had, hath, and of Right ought to have full Power and Authority to make Laws and Statutes of sufficient Force and Validity, to bind the Kingdom and People of *Ireland*.

And be it further declared and enacted by the Authority aforesaid, That the House of Lords of *Ireland* have not, nor of Right ought to have any Jurisdiction to judge of, affirm or reverse any Judgment, Sentence or Decree, given or made in any Court within the said Kingdom, and that all Proceedings before the said House of Lords upon any such Judgment, Sentence or Decree, are, and are hereby declared to be utterly null and void to all Intents and Purposes whatsoever.

This statute, then, went beyond the issue that had occasioned it to the broader question of legislative authority. The statement in the preamble to the effect that the appellate jurisdiction of the Irish Lords was a recent and illegal assumption of power will not bear historical scrutiny,[133] but the right of the British Parliament to legislate for Ireland stood upon a very different footing. This may have

been recognized by those who drafted the bill, for while it was merely "declared" that Parliament had the legal right to legislate for Ireland, it was "declared and enacted" that the Irish Lords possessed no appellate jurisdiction.

* * *

For more than sixty years the Declaratory Act remained on the British statute book, and during that period the right which it asserted was frequently exercised by the British Parliament. But the doctrines of Molyneux were not forgotten by the Irish people. The belief that Ireland had been, was, and of right ought to be independent of the British Parliament lay in the background of all Anglo-Irish controversy, whatever the immediate issue. A few years after the passing of the Declaratory Act an outburst of popular indignation forced the British Government to abandon an attempt to introduce a debased copper coinage into Ireland. Dean Swift put himself at the center of opposition by publishing in 1724, over the pseudonym "M. B. Drapier," a series of letters which had an immense effect and gave him a high place in Irish patriotology. In the fourth letter, addressed to the people of Ireland, he went beyond the question of the coinage, which did not directly involve the issue of British legislation for Ireland, and declared that "all government without the consent of the governed is the very definition of slavery." A dependent kingdom he pronounced to be "a modern term of art," and the authority of the British Parliament over Ireland, a recent innovation. He paid his respects to "the famous Mr. Molyneux" and assured his readers that he had "looked

over all the English and Irish statutes without finding any law that makes Ireland depend upon England, any more than England does upon Ireland.'' [134] One cannot help suspecting that the Dean's hostility to Sir Robert Walpole's Government influenced him in his historical research. Attempts were made to secure the arrest of the writer of this letter and the indictment of the printer, but they failed. Swift, says Lecky, ''struck a chord which for the first time vibrated through every class in Ireland.'' [135]

Charles Lucas was another conspicuous champion of Irish liberty. His writings would impress the modern reader as insufferably prolix and dull, but in his day he enjoyed a great reputation as a reformer and patriot. In a series of addresses to the citizens of Dublin, isued in 1748-49, and in other writings published at about the same time, he restated the Irish claim to legislative independence.[136] His views on this and other subjects gave great offence to the Irish Government, and the importance that was attached to them can be measured by the fact that the Irish House of Commons voted him to be an enemy to his country and ordered his arrest.[137]

This vote is not surprising, for at the time the Irish House of Commons was not really representative of even the Protestant minority of Ireland, and the disfranchisement of the Roman Catholics left the large majority of the population without even virtual representation, since all political power was in the hands of their adversaries. All the conditions that go to explain the unrepresentative character of the unreformed British House of Commons —

controlled and corrupt constituencies, the presence in the House of office-holders and pensioners, *etc.* — existed in Ireland, and there were others peculiar to that country.[138]

But undemocratic as the Irish electoral system was, popular discontent with the *status quo* began to be reflected in the Irish Parliament soon after the middle of the eighteenth century. It received powerful impetus from Great Britain's embarrassments in the European war that grew out of the American Revolution. Associations of Irish Volunteers, formed to protect the country from invasion but not under Government control, and supported by Catholics as well as Protestants, gave the nationalist leaders in Parliament a strength that made their demands irresistible.

In 1780 the British Parliament, yielding to necessity, removed most of the commercial restrictions which in earlier times it had placed upon Irish trade and industry. But so long as it claimed the right to legislate for Ireland, there could be no guarantee that similar restrictions would not be imposed in the future. The basic issue was constitutional. If the Irish Parliament was to be an independent Parliament, free from all external control, Poyning's Law and the Declaratory Act must be repealed.

The repeal of Poynings' Law, which is not strictly germane to an inquiry concerned with the authority of the British Parliament over Ireland, may be dismissed briefly.[139] Under that statute, passed by the Irish Parliament in 1495 and modified in 1556, Parliaments could be held in Ireland only with the previous sanction of the English Privy Council, and their legislative power was confined to accept-

ing or rejecting such bills as had been framed by the Irish Privy Council and approved, with or without amendment, by the English Council. After the Revolution of 1689 it became customary for individual members of the Irish House of Commons to introduce "heads of bills," which, if agreed to by the House, were presented to the Lord Lieutenant for transmission by the Irish to the English Council, to be resubmitted to the Irish Parliament if re-transmitted from England. But the initiative which this procedure gave to the Irish Commons was incomplete and indirect. The Irish Privy Council could still originate legislative measures, and neither Privy Council was obliged to approve the proposals made by the Irish Commons. Both had the alternatives of approval, amendment or rejection. Such a situation was naturally galling to independent and patriotic members of the Irish Parliament, and from the closing years of the reign of George II Poynings' Law came under frequent attack. At length, in 1782, it was repealed by an Irish statute, which provided that all bills passed by both Houses of the Irish Parliament, and no others, should be certified, under the great seal of Ireland, by the Lord Lieutenant and Council of Ireland to the King, "without addition, diminution, or alteration," and that such of these as were returned under the great seal of Great Britain "without addition, diminution, or alteration," and no others, should pass in the Parliament of Ireland.[140]

* * *

Before Poynings' Law was repealed the battle to free Ireland from the jurisdiction of the British Parliament

had been reopened by Henry Grattan in the Irish House of Commons. On April 19, 1780, he moved: "That the King's most excellent Majesty, and the Lords and Commons of Ireland, are the only power competent to make laws to bind Ireland." [141] Though for reasons of expediency this resolution was not adopted, the House was overwhelmingly with Grattan on the constitutional question, and his speech created a sensation throughout Ireland. In it he referred pointedly to the humiliations and disasters suffered by Great Britain during the war and called upon the Irish people, "with charters in one hand and arms in the other," to assert their rights and repudiate a power that had "no foundation in utility or necessity, or empire, or the laws of England, or the laws of Ireland, or the laws of nature, or the laws of God." The demand for constitutional reform received powerful and probably decisive support from the Volunteers. On the initiative of Lord Charlemont, Grattan's parliamentary patron, a convention of delegates representing 143 corps of Ulster Volunteers met at Dungannon on February 15, 1782, and adopted a series of resolutions, one of which declared, "That a claim of any body of men, other than the King, Lords, and Commons of Ireland, to make laws to bind this Kingdom, is unconstitutional, illegal, and a grievance." [142] Just a week later, on February 22, Grattan moved for an address to the King declaring that the people of Ireland were a free people, subject to the legislative authority of the Irish Parliament alone, that this was the very essence of their liberty, and that the connection between Ireland and Great Britain could be strengthened in

no other way so effectively as by a renunciation of the claim of the British Parliament to make laws for Ireland, "a Claim useless to England, cruel to Ireland, and without any Foundation in Law."[143] In his speech on this occasion Grattan followed at length the historical arguments of Molyneux.[144] Again, as in 1780, he failed to carry his motion, but, as before, the opinion of the House was virtually unanimous that the British claim was not warranted in law.[145]

In March, 1782, there was a change of ministry in England. The Marquess of Rockingham succeeded Lord North, and the new administration determined upon a policy of reconciliation with Ireland. Announcement to this effect having been made to the Irish Parliament, both Houses adopted addresses to the King, embodying the substance of the rejected address of February 22 and stating that the Declaratory Act was the chief cause of Irish unrest.[146] When the British cabinet decided to yield to the Irish demands, different ways of doing so were considered. Parliament might be asked expressly to renounce for the future the right of legislating for Ireland; it might be asked to declare that it had never legally possessed that right; or it might be asked merely to repeal the Declaratory Act. After consideration, the first two alternatives were rejected. It was thought that an explicit renunciation of the right, as a right previously vested by law in the British Parliament, might give offense to Ireland; and it was realized that Parliament would not agree to the proposition that its past authority over Ireland was usurped. A simple repeal of the

Declaratory Act was therefore decided upon as the least objectionable mode of procedure.[147] On May 17, accordingly, a resolution for repeal was passed by both Houses of Parliament, and the repealing act became law on June 21.[148]

What, precisely, did it signify? The British ministry looked upon it as a renunciation by the British Parliament of all authority over Ireland, and at first it was generally interpreted in this sense in Ireland. According to Charles James Fox, the minister in charge of the repeal bill in the House of Commons, the intention of the Government was "to make a complete, absolute, and perpetual surrender of the British legislative and judicial supremacy over Ireland," and the Irish House of Commons declared by resolution that the British Parliament had "fully, finally and irrevocably acknowledged" the "sole and exclusive Right of Legislation in the Irish Parliament in all Cases."[149] It is improbable, however, that any English judge would have accepted this construction of the repeal, and it was questioned both in the British and in the Irish Parliament. In the Irish House of Commons Henry Flood urged that an explicit renunciation of the right asserted in the Declaratory Act was necessary for the security of Ireland, on the ground that the repeal of a declaratory act was not a surrender of the right affirmed in such act. "It is a first principle of law," he said, "that a declaratory act only declares the law to be what it was before; that is to say, that it only declares, and that it does not alter the law." Therefore, "if a declaratory act is not pronounced to have been an erroneous declaration of law, the bare repeal of it can do

no other than leave the law in that state in which the declaratory act did declare it to have been before such declaratory act passed.'' Flood, like Grattan, thought that the power which the British Parliament had been exercising over Ireland was an usurped power, but he differed from him in maintaining that the repeal of the Declaratory Act left the usurped power unrenounced. He moved to take the opinion of the judges on the question: ''Does the repeal of a declaratory act amount, in legal construction, to a repeal or renunciation of the legal principle on which the declaratory act grounded itself?'' But the House accepted Grattan's opinion that an express renunciation was unnecessary, and the motion was defeated.[150] This was in June, 1782.

In Ireland, where the Declaratory Act was viewed as an act of usurpation and not a declaration of pre-existing law, it was logical to regard the repeal as a renunciation of an illegal power. According to this interpretation all English statutes applying to Ireland were void, and therefore all titles to lands in Ireland based upon such statutes were invalid. This aspect of the case received the anxious attention of the Irish Parliament, which passed an act providing that all previous English statutes relating to forfeited estates and certain other specified subjects should be accepted and executed in Ireland.[151]

But, as Flood pointed out, Irish construction of the repeal was not and could not be accepted in England, and it soon became evident that his contention that Ireland needed additional security was not captious. Scarcely a fortnight

after the repeal took effect, a British peer, Lord Abingdon, speaking in the House of Lords, said that Parliament had given up the power to legislate in the internal affairs of Ireland, but had not relinquished the right to regulate its external commerce; and he announced his intention of bringing in a bill to "enact and declare" that the Parliament of Great Britain had, had always had, and ought always to have power to make laws to regulate "the external commerce or foreign trade of Great Britain, and of all such kingdoms and countries, parts and places, as now are, or hereafter may be, under the sovereignty of, that are annexed to, connected with, or in any wise dependent upon . . . . the imperial crown of this realm." [152] Though the bill was not formally introduced, the incident was not reassuring to Irish patriots, and doubts as to the adequacy of the repeal of the Declaratory Act presently grew into a widespread conviction that it was insufficient.

The Declaratory Act, it will be recalled, had abolished as illegal the appellate jurisdiction of the Irish House of Lords. Following its repeal, the Irish Parliament restored this jurisdiction and abolished all appeals to England, "any law, statute, or practice to the contrary thereof, in any wise notwithstanding." [153] It happened that in 1782 a case which had been removed from an Irish court by writ of error, in accordance with what was then regular judicial procedure, was pending in the King's Bench in England, where judgment was given by Lord Mansfield after the repeal of the Declaratory Act and the passing of the Irish act that has just been referred to. Since no British statute

had abolished appeals from Ireland to England, the English court was legally bound to proceed as it did, but its action naturally caused great excitement in Ireland.[154] As was pointed out in debate in the British House of Commons, English and Irish law were in conflict; "the English courts were bound by law to receive a writ of error from Ireland, although all their proceedings upon such writ were rendered nugatory in Ireland, by a late Act of the Irish parliament."[155] If appeals could still be taken from Irish courts to the King's Bench in England, and ultimately to the House of Lords in England, what security, it was asked, had the people of Ireland against a revival of the legislative power of the British Parliament over Ireland?

On the ground that doubts had arisen whether the repeal of the Declaratory Act was a sufficient guarantee of the legislative and judicial independence of Ireland, the British Parliament, in the session of 1783, passed what is known as the Renunciation Act.[156] By this it was declared and enacted:

> That the said right claimed by the people of Ireland to be bound only by laws enacted by his Majesty and the parliament of that kingdom, in all cases whatever, and to have all actions and suits at law or in equity, which may be instituted in that kingdom, decided in his Majesty's courts therein finally, and without appeal from thence, shall be, and it is hereby declared to be established and ascertained for ever, and shall, at no time hereafter, be questioned or questionable.

The prolonged controversy that we have been following thus ended in a complete victory for Ireland, though the

victory, it is true, when viewed in the light of subsequent history, loses the finality that was hopefully attributed to it by contemporary Irish patriots. Still, the constitutional question at issue was settled. Until the Act of Union, in 1800, gave Ireland representation in the Parliament at Westminster, that Parliament made no attempt to legislate for Ireland. But from the evidence presented in this and the preceding chapter the reader will probably judge that the merits of the Irish claim, and the reasons for its triumph, are to be found elsewhere than in the strength of the historical arguments used to support it.

Chapter III

AN EARLY COLONIAL PROTEST

The establishment of the Puritan Commonwealth led to the first disruption of the English Empire. In most of the dominions the Revolution of 1649, unlike that of 1689, did not meet with popular approval, the authority of the new English Government was repudiated, and the heir of the late King was proclaimed as Charles II. Scotchmen, Irishmen, Manxmen, Jerseymen, Barbadians, Antiguans, Virginians and Marylanders were more than willing to be subjects of the monarch who was lawful King of England and protested their loyalty to him, but they would not voluntarily become citizens of an English republic. Only in the Puritan colonies of New England was the predominant sentiment favorable to the Commonwealth, and even in New England there was strong dissent from Parliament's claim to imperial supremacy. The outcome of the seventeenth-century revolts within the Empire is in complete contrast with the result of the American Revolution, for in every case the English Government, though resting on no broad basis of public support at home, was able to secure recognition of its authority; a regicide republic succeeded where the monarchy of George III was to fail. But the arguments by which the dominions sought to justify themselves in the crisis of 1649-52 may profitably be compared

with those which the American colonists advanced against the claims of Parliament in the days of the Stamp Act and the Continental Congress. No better illustration of this early conflict between imperial unity and dominion separatism can be found than in the relations between the Commonwealth and Barbados, then the most populous and important of the English oversea colonies. And in view of latter-day conjecture as to what might happen to the Empire if a republic should be established in England, it may be of some interest to recall what did happen when a republic was in existence there.

The colonization of Barbados dates from 1627, when an expedition sent out by an association of English merchants formed by Sir William Courteen founded a settlement there. In its early years the colony was the scene of conflicts resulting from rival proprietary claims. In 1627 Charles I conferred upon the Earl of Carlisle, a Scotch courtier who was in chronic financial straits, a proprietary patent for the Caribbee Islands (as the Lesser Antilles were then called), including Barbados. A few months later, however, he granted the proprietorship of Barbados, Trinidad and Tobago to another nobleman, the Earl of Pembroke, acting in behalf of Courteen. Carlisle's claim to Barbados, however, was supported by the English Government, and his authority over the island was established by 1630. For the satisfaction of his numerous creditors the Earl, shortly before his death, in 1636, transferred his proprietary rights to trustees, and under their authority Barbados was governed for some time. His heir, the second

Earl of Carlisle, alleging that the transfer was invalid, brought suit against the trustees but failed to get judgment. From the outbreak of the Civil War in England proprietary authority in the Caribbees was in virtual abeyance, though the Carlisle patent was not actually surrendered to the Crown until 1662, after which Barbados became a royal province.[1]

The colony grew very rapidly. At first the principal industry was the cultivation of tobacco, which was grown mainly on small estates worked by white labor. According to a contemporary, who professed to base his statements upon an examination of the archives of the colony, there were some 11,000 proprietors in the island in 1645, and more than 18,000 men capable of bearing arms.[2] These figures are probably exaggerated, but there is no doubt that the population of Barbados in the middle of the seventeenth century was much larger than that of any of the other English colonies.[3] Massachusetts and Virginia were the most populous of the continental colonies, and according to the most reliable estimate their aggregate total population in 1650 was only 35,000.[4] The growth of sugar culture, which was begun soon after 1640, led to a great change in the social system, resulting in an increase in the size of estates, a reduction of their number and the substitution of negro slaves for white laborers. According to the same authority there were fewer than 750 proprietors in 1667 and more than 80,000 slaves, and during the period 1645-1667 some 12,000 whites emigrated from the island to other colonies.[5]

The Long Parliament claimed executive as well as legis-

lative authority over the King's dominions, and by an ordinance passed in November, 1643, the Lords and Commons appointed the Earl of Warwick Governor-in-Chief and Lord High Admiral of all the English colonies in America and the West Indies, associating with him a Board of Commissioners made up of members of the two Houses.[6] The powers conferred upon the Earl and commissioners included the authority to appoint and remove colonial governors and other officials and to provide for the welfare and security of the colonies. The attitude of the West Indies toward the contending parties in the English Civil War has been characterized as one of "watchful neutrality."[7] Public sentiment was predominantly royalist, but the planters seem to have hoped for peace without victory. At any rate, they had no desire for such an outcome as would result in the establishment of effective imperial control and the termination of the virtual independence which they were enjoying. Thus in 1645 Barbados refused to recognize the authority of a commissioner sent over from England by the King; and in the following year the Governor and Council professed themselves unable to render obedience to the Warwick Commission for the reason, among others, that the colonists had subscribed to a "general Declaration" not to receive "any Alteration of Government" until peace had been made between the King and Parliament.[8] In the words of a contemporary, the Barbadians "temporised with all new Commissions, came they either from the Parliament or late King."[9] To execute the authority over the colonies which it claimed Parliament

required an adequate naval force, and this was not available until after the establishment of the Commonwealth.

Early in 1647, after the close of the First Civil War and at a time when negotiations were in progress between the parliamentary leaders and the King looking to a settlement on the basis of limited monarchy and a Presbyterian church establishment, the second Earl of Carlisle leased the proprietorship of the Caribbees for a term of twenty-one years to Francis Lord Willoughby of Parham and commissioned him as Lieutenant General of the islands. Willoughby was to pay a nominal rent and to enjoy one-half of the proprietary revenues, the remainder to go to Carlisle to satisfy his father's creditors. As a matter of fact, the islands at this time were yielding no revenue to the proprietor, and there was no likelihood that they would do so unless monarchy was re-established in England. Willoughby was one of the leaders of the Parliamentary-Presbyterian party, and Carlisle's motive, presumably, was to secure support for his patent, which was about to come under attack in Parliament.[10] The progress of events in 1647-48 was fatal, however, to the Presbyterian cause, and early in the latter year Willoughby fled to Holland, where he espoused the cause of the Prince of Wales, then in exile at The Hague.

By the time of the establishment of the Commonwealth royalism in Barbados had been strengthened by the arrival of emigré Cavaliers, who quickly acquired influence and authority in the colony.[11] News of the execution of the King, however, did not lead to a royalist uprising; nor

did a letter from the Council of State,[12] the chief executive organ of the Commonwealth, commanding the colony to render obedience to the new régime in England, provoke any immediate act of defiance. But early in the following year, 1650, rumor was spread by leaders of the Cavalier faction in Barbados that the friends of Parliament in the colony were conspiring to seize royalist estates, establish Puritan worship and set up the authority of the regicide Commonwealth;[13] and in April the royalists took up arms and gained control of the government. At this juncture Willoughby arrived with his commission from Carlisle and another from Charles II, who had assumed the title of King in the preceding year at The Hague when information of his father's death was received there. A few days later the new King was formally proclaimed in Barbados,[14] though Parliament, by an act of January 30, 1649, had expressly forbidden any person to proclaim the son of Charles I, "commonly called the Prince of Wales," to be King of England or of Ireland or of "any the Dominions belonging to them."[15] The royalists of Barbados thus declared independence of the revolutionary Government of England. After Willoughby left the colony to establish his authority in the other islands of his proprietorship the victorious party in the Legislature passed an act banishing the leading Commonwealth men and confiscating their estates.[16] The story which these refugees had to tell when they reached England led the Puritan Government to resolve upon the subjugation of the colony which had thus boldly defied its authority.

On August 30, 1650, the committee in charge of the Admiralty ordered that "the business of Barbados" be taken into consideration and that a bill be drafted to prohibit trade with the recalcitrant colony, and at the same time recommended that a naval expedition be sent out "for reducing that island to the obedience of the Commonwealth."[17] In Virginia, Bermuda and Antigua, as well as in Barbados, the authority of the Commonwealth had been defied, and on October 3, 1650, Parliament passed an act to prohibit trade with all these colonies.[18] As an assertion of parliamentary jurisdiction over the colonies it will bear comparison with the famous Declaratory Act of 1766. In the preamble it was declared that the colonies, "planted at the Cost, and settled by the People, and by Authority of this Nation," were and ought to be "subordinate to, and dependent upon England," and that they had always been and ought to be "subject to such Laws, Orders and Regulations as are or shall be made by the Parliament of England." The inhabitants of the four colonies were charged with having committed "divers acts of Rebellion," usurped a "Power of Government" and "set up themselves in opposition to, and distinct from this State and Commonwealth." All persons in these colonies who had been involved in "horrid Rebellions" were declared to be "notorious Robbers and Traitors," and all commerce with them was forbidden under penalty of forfeiture of vessel and cargo, though it was provided that English ships might trade with the offending colonies if licensed to do so by the Council of State.[19]

Willoughby was back in Barbados by October, 1650, and in that month the Legislature passed an act declaring the right of Charles II to dominion over the colony, and the proprietary rights of the Earl of Carlisle, derived from the patent of Charles I, and of Lord Willoughby, derived from Carlisle. It provided also for the unanimous profession of the Anglican religion in the colony and for the punishment of dissenters.[20]

Early in 1651 information was received of Parliament's punitive act and the decision of the Commonwealth to "reduce" the colony. Willoughby and his Legislature at once accepted the challenge. On February 18 an act was passed by the Lord Lieutenant General with the assent of the Council and Assembly declaring the independence of the colony. Parliamentary authority was repudiated, and the rights of the colonists were formally asserted.[21] Obedience to the Act of 1650 was refused by the announcement that foreigners would continue to enjoy freedom of trade with Barbados, and that "all honest means" would be used to continue commerce with England. In denial of the charge that the existing régime in the colony was based on usurpation it was declared that "the Government now used amongst us, is the same that hath always been ratified, and doth every way agree with the first settlement and Government in these places; and was given us by the same power and authority that New England hold theirs; against whom the Act makes no objection." In contradiction of the parliamentary assertion that the colony had been settled at the cost of the people of England and was subject to the juris-

diction of the English Parliament it was stated that the colonists were the people who, with great danger and at heavy expense to themselves, had settled the island, "and shall we therefore," it was asked, "be subject to the will and command of those that stay at home?"

But the royalists of Barbados were not content with rejecting the authority of the existing English Parliament because it was not a legal Parliament. They denied, by implication, the right of *any* English Parliament, even a legal one, to legislate for them, basing their claim on the ground that they were not represented at Westminster and that legislation without representation was a violation of the rights of Englishmen. Their view was thus expressed in Lord Willoughby's Declaratory Act:

> Shall we be bound to the Government and Lordship of a Parliament in which we have no Representatives, or persons chosen by us . . . . to propound and consent to what might be needful to us, as also to oppose and dispute all what [sic] should tend to our disadvantage and harme? In truth, this would be a slavery far exceeding all that the English nation hath yet suffered. And we doubt not but the courage which hath brought us thus far out of our own country, to seek our beings and livelihoods in this wild country, will maintaine us in our freedoms; without which our lives will be uncomfortable to us.

It was not until the later and greater dispute between Great Britain and the North American colonies was about to pass from argument to arms, not until the year of the so-called "Intolerable Acts" and the First Continental Congress, that any considerable number of the colonists

were prepared to accept so radical a doctrine as that which Lord Willoughby's Legislature had proclaimed nearly a century and a quarter before. In 1651, as in 1774, though loyalty to the King was affirmed, the legislative authority of Parliament was repudiated as unconstitutional for the reason that there were no colonial representatives in the House of Commons. If we knew what was said in the Legislature of Barbados, we should perhaps find the specific arguments of 1774 anticipated. We may assume that much was made of the tyranny of legislation without representation, of the rights of the colonists as Englishmen, of charter privileges. And to justify what was advanced as a constitutional, not a revolutionary claim, there must have been some appeal to precedents.

The Council of State appointed Sir George Ayscue as Commander-in-Chief of a squadron to be sent against the rebellious colony and commissioned him as its Governor, associating with him other commissioners for "reducing" the island. The colonists were to be required to submit to the authority of the Commonwealth and accept such governors as might be appointed from time to time; and certain Acts of Parliament, including those abolishing the monarchy and the House of Lords, were to be published in the colony. Such of the inhabitants as had suffered in person or estate by reason of their adherence to the Commonwealth were to have full reparation, and the expenses incurred in the reduction of the island were to be repaid, as far as practicable, by those colonists whose rebellion had made it necessary.[22]

After a delay of some months, caused by operations against the Scilly Isles, which royalist privateers had been using as a base, Ayscue's squadron set sail for Barbados, arriving there on October 16, 1651. In a document which was scattered broadcast through the colony the commissioners called upon the inhabitants to prevent bloodshed and the destruction of property by accepting offers of peace and clemency, but at the end of October, in a despatch to the English Government, Ayscue reported that the military strength of the colony made conquest impossible.[23] Early in November the Assembly unanimously declared its determination to "stick" to Willoughby and defend the King's lawful authority over the island, and in correspondence with Ayscue, Willoughby took a high tone. News of the crushing defeat of the English royalists by Cromwell at Worcester must, however, have weakened the morale of Willoughby's supporters; and after reinforcement by a fleet intended for the reduction of Virginia, Ayscue succeeded in landing a part of his force and inflicting a defeat upon his enemy.[24] The defection from Willoughby of Colonel Thomas Modyford, who brought over to Ayscue some 2,000 men, decided the issue,[25] and on January 11, 1652, articles of surrender were concluded and agreed to by representatives of Willoughby and the commissioners of the Commonwealth.[26] These provided, among other things, that the island should be delivered to Ayscue "for the use of the States of England"; that the government of the colony should consist of a governor, appointed by the English Government, a council, chosen by him, and an as-

sembly, elected by the freeholders in the several parishes; that an act of indemnity should be passed by Parliament in the interest of those colonists who had resisted the Commonwealth, such act to be filed among the records of the Assembly; and that no taxes should be laid upon the colonists "without their consent in a General Assembly." The terms, as Mr. Williamson says, "although they involved the complete extinction of Royalist pretensions, were favorable to the Barbadians as colonists,"[27] and the Articles of Capitulation came to be regarded as the "charter" of the colony, and were so designated in a compilation of laws published soon afterwards.[28] The formal delivery of Barbados to the Commonwealth took place on January 12,[29] and in the following March Willoughby left the island, sailing away to his colony of Surinam in Guiana. In the same month Ayscue departed, leaving Daniel Searle, one of the Commonwealth's commissioners, to act as Governor.[30] Searle served in this capacity until the Restoration, when Willoughby's authority was restored.[31]

But in submitting to the Commonwealth the royalists of Barbados had only yielded to necessity. For a time Governor Searle convinced himself that they had experienced a change of heart,[32] but events soon forced him to alter his opinion.[33] According to one John Bayes, a Roundhead of Barbados, the majority of the members of the Assembly chosen shortly after the capitulation were "old, overgrown, desperate malignants," and the Governor was outvoted by members of this party in his own Council.[34] In a letter to the Council of State, written in June, 1652, he asserted

as a fact of which he had positive knowledge, that there was a design to make the colony a free state, "and not run any fortune with England, either in peace or war." [35] Having returned to England to press his views on the Government, he declared that "a high faction prevalent in Barbados" was seeking to establish a free state, choose their own governors, make their own laws and establish free trade with all nations.[36] In 1653 the Assembly was dissolved, but in the following election the candidates supported by the Governor were rejected, and he reported to the Council of State that a majority of the members chosen to the new Assembly had been enemies of the Commonwealth. In the same despatch he said that there were "restless spirits" in the island, who desired to model "this little limb of the Commonwealth into a free state." [37]

More practicable than the projects of Barbadian separatists was a constructive proposal for imperial consolidation that came from the colony at this time. In a letter to the President of the Council of State, written in February, 1652, Colonel Modyford asked that Barbados be permitted to elect two representatives to sit in Parliament, with the right to vote on questions that concerned the colony.[38] "To demand to have burgesses with you to sitt and vote in matters concerning England may seeme immodest," he said, "but to desire two representatives to be chosen by this Island to advise and consent to matters that concern this place, I presume may be both just and necessary." [39] This is the first suggestion, so far as is known, of direct colonial representation in Parliament. Modyford's letter was re-

ferred to the Council, and there is evidence to show that his proposal received consideration,[40] though what was thought of it is not recorded. Our sources of information for public opinion in Barbados in the seventeenth century are not abundant, and it is not known whether Modyford was voicing the desire of any considerable part of the population of the island. The idea must have found some support, however, for a few months later a group of Barbadian planters resident in London submitted a number of proposals to the Council of State, one of which was that two persons be permitted to sit and vote in Parliament as representatives of Barbados. There could then be no complaint, they said, since the island would have the same privilege as any English county.[41]

The desire for representation in Parliament seems to have been fairly general in the colony a generation later. In 1689 Edward Lyttleton, a planter of Barbados, wrote a pamphlet that was published in London, in which he complained of the restraints that had been placed upon the commerce of the island by the Acts of Trade. He thought of the colonies as extensions of England, rather than as external dependencies, and as such entitled to representation in Parliament. After expressing a desire for such representation he said:

> Are we not of your own number? are we not English Men? . . . . How came we to lose our Country, and the Priviledges of it. . . . . Suppose a Quantity of Land were gain'd here out of the Sea, by private Adventurers, as bigg as two or three Counties. . . . . Suppose also, that people went by degrees from all parts of *England*, to inhabit and

cultivate this New Country. Would you now look upon these people as Forrainers and Aliens? . . . . Would you forbid them all forrain Trade; and so burden their Trade to *England*, that their Estates should become worth nothing? . . . . It cannot be thought that you would do these things, rather you would esteem the Country a part of England, and cherish the People as *English* Men. And why may not the Plantations expect the like Kindness and Favour? If the thing be duly weighed, They also are meer Additions and Accessions to *England*, and Enlargements of it. And our case is the very same with the case supposed. Only herein lies the difference, that there is a distance and space between *England* and the Plantations.[42]

Chapter IV

SLAVERY AND CONSTITUTIONALISM

As a proposition of law it is no longer questioned that the authority of the British Parliament is unlimited throughout the British Empire. Its claim of "absolute sovereignty," Dicey tells us, "would be admitted as sound legal doctrine by any court throughout the Empire which purported to act under the authority of the King,"[1] and such a statement is not challenged by the most stalwart champions of Dominion autonomy.[2] Even the declaration of the Imperial Conference of 1926, that Great Britain and the Dominions are "autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs,"[3] does not affect the legal powers of Parliament, for the Imperial Conference possesses no legislative authority; it was merely formulating rules of constitutional practice. It is true that the power of Parliament to legislate for the self-governing Dominions has gone to join what Maitland called "the ghostly company of legal fictions," and today an Act of Parliament interfering in the internal affairs of a Dominion would be called unconstitutional and could not be enforced, but the word "unconstitutional" would be used with a meaning different from that which it conveys to an American. By it would be meant that the

act in question was contrary to established usage and convention, but not that it was illegal or void.[4] Yet it is well known that the doctrine that Parliament is legally omnipotent, even within the British realm, is one of no high antiquity; and Parliament's claim to unlimited legislative authority over the American colonies was countered by the doctrine that the rights of the colonists were guaranteed by fundamental law which Parliament could not alter. The purpose of this chapter is to show that the idea cherished by the American Revolutionists, namely, that Parliament was not a sovereign legislature for the British Empire, but on the contrary was bound by fundamental law, was held in other colonies than those that revolted, and that it lived on in the Empire for years after the American Revolution. This will involve an examination of the position taken in the British West Indies with respect to a series of measures brought forward in England with a view to improving the condition of the slave population of the islands.

* * *

In 1807, in consequence of an organized agitation of twenty years' duration, Parliament abolished the slave trade.[5] From the outset it had been the hope of the abolitionists that the termination of the trade would lead to better treatment of the slaves in the British colonies and eventually to the extinction of slavery, but their professed object was to put a stop to the traffic, not to emancipate the slaves.[6] Constitutional considerations were taken into account in deciding not to work for immediate emancipation, for it was felt that while Parliament had an undoubted

right to regulate the commerce of the Empire, it was doubtful if it had the right to interfere in the internal affairs of the colonies.[7] In spite of the penalties of forfeiture for which the Abolition Act provided, contraband trade in slaves continued to be carried on to some extent by British subjects, and in 1811 Parliament made participation in the trade a felony punishable by transportation or confinement at hard labor.[8]

In 1791 an association of English abolitionists and merchants was incorporated by Act of Parliament, under the name of the Sierra Leone Company, for the purpose of carrying on trade between Great Britain and Africa.[9] Its objects, as stated in one of its early reports, were "to encourage trade with the west coast of Africa; to promote cultivation, advance civilization, diffuse morality, and induce some attention to a pure system of religion in Africa," and also "not to suffer their servants to have the slightest connexion with the slave trade . . . . and to repress the traffic as far as their influence would extend." [10] The Crown had already acquired a tract of land on the coast of Sierra Leone, where a settlement had been made, consisting mainly of destitute free negroes from England, and in 1800 this was granted to the company, with authority to govern the colony. But neither company nor colony prospered, and in 1807 the former was dissolved, and the latter passed under the immediate authority of the Crown.[11]

In the same year a society was organized in London known as the African Institution. A royal prince, the Duke of Gloucester, was its patron and president,[12] and among

its members were several of the directors and other members of the Sierra Leone Company, as well as a number of peers, members of the House of Commons and other persons of prominence in public life. In the list of the original directors of the new society are the names of the leading abolitionists — Wilberforce, Clarkson, Granville Sharp, Brougham, James Stephen and Zachary Macaulay, to mention only a few of them. The African Institution, unlike the Sierra Leone Company, was not organized to promote commerce or colonization, though one of its directors, Zachary Macaulay, carried on an extensive trade with Sierra Leone.[13] Among its professed objects were: to promote the civilization and happiness of the natives of Africa; to cultivate friendly relations with them; to enlighten them with respect to their true interests and the means whereby they might substitute a beneficial commerce for the slave trade; to introduce among them the useful arts of Europe; to acquire a knowledge of the principal languages of Africa and reduce them to writing; and to encourage and reward individual enterprise in promoting any of the purposes of the Institution.[14] From the outset the African Institution proposed to act as self-appointed adviser of the Government in matters relating to Africa and slavery. It regarded it as its business to endeavor to prevent the infraction of the Abolition Laws, to suggest means by which they might be made more effective, and to promote the abolition of the slave trade by foreign nations.[15] It was in close contact with Parliament and the Government, and its recommendations carried great weight.[16] Brougham's connection with

the *Edinburgh Review* insured for the annual reports of the directors wide publicity through laudatory articles in that journal.[17]

Early in 1812 the abolitionists decided that the best means of preventing violations of the Abolition Acts would be to require all slave-owners in the colonies to register their slaves, and it was decided that an attempt ought to be made to secure an Act of Parliament for this purpose.[18] The Prime Minister, Spencer Perceval, was persuaded to establish at once a registry of slaves in Trinidad, a colony which possessed no representative legislature of its own and was subject to the legislative authority of the Crown; and an order in council providing for registration of the slaves in that island was presently issued.[19] The abolitionists continued to discuss the question of a general registration of slaves throughout the British West Indies by Act of Parliament, but Perceval favored delay in order to see how the experiment worked in Trinidad.[20] At first the new law, which provided, among other things, that the absence of a name from the register should be taken as conclusive evidence of the person's right to freedom, aroused the planters of Trinidad to a storm of protest, and many of them pledged themselves not to make the required returns of their slaves; but eventually all seem to have complied with the terms of the law.[21]

The attention of Parliament and of the public was called to the question of slave registration by an elaborate report on the subject put forth by a committee of the African Institution and published early in 1815.[22] The document,

which was written by Stephen, was the subject of a long and extremely sympathetic article by Brougham, which appeared in the *Edinburgh Review* of October, 1815,[23] and was distributed to members of Parliament.[24] According to this report, there was abundant reason for believing that slaves had been imported into some, if not all, of the British West Indies since the abolition of the slave trade. A few "ostensible regulations" in the interest of the slaves had been made by the West India legislatures, but they were declared to be "demonstrably futile"; it was asserted that the slaves so far had derived no benefit from the Abolition Acts, and that the colonial assemblies did not regard abolition as effectual but still looked to Africa for fresh supplies of slaves. Existing Acts of Parliament contained no practical provisions to prevent negroes illegally imported into the colonies, and not confiscated for that cause, from being kept in slavery. "It is highly desirable . . . . that means should be devised, if possible, to make the true condition of the colonial negroes matter of public, notorious and conclusive evidence," and "a still greater *desideratum* that the means so to be provided should be calculated to act in general without the direct and active aid of any court or magistrate." It was submitted that the best means of accomplishing this object would be a public registry of slaves throughout the British West Indies, similar to that already established in Trinidad, and various reasons were given to show that the colonial legislatures were incompetent to legislate effectively to this end.

On June 13, 1815, at a moment when the attention of the nation was focused on the final campaign against Napoleon, Wilberforce moved in the House of Commons for leave to bring in a bill "for better preventing the illicit Importation of Slaves into the British Colonies." Speaking for the Government, Lord Castlereagh, the leader of the House, gave it to be understood that he did not object to the bill being brought in and printed, provided that further proceedings upon it should be deferred to another session, but that he thought it inexpedient for Parliament to pass such a measure if the colonial legislatures could be induced to do so themselves. Wilberforce agreed not to press his bill during the session, and leave to introduce it was granted.[25] It was read a first time on July 5 and ordered to be printed.[26]

The bill was modeled on the Trinidad order in council.[27] The preamble declared that illicit importation of slaves into the British colonies wherein slavery was established by law, and the holding in slavery therein of negroes and mulattoes lawfully entitled to their freedom, could not be effectually prevented "without some better provision than the Laws in force within the said Colonies have made for ascertaining the numbers and identifying the persons of the Slaves now within the same, and of the future Issue of the female Slaves, upon whom by the laws of the said Colonies the condition of Slavery descends," and further, that for various reasons, "the necessary Provisions and Regulations for the purpose aforesaid cannot be fully and effectually

made by the separate interior Legislatures of the said Colonies respectively, but only by the Authority of Parliament."

The bill then provided for the establishment in every British colony where slavery was lawful of a public registry for the enrollment of the names and descriptions of all persons held as slaves, and for the appointment of a registrar of slaves for each colony. All persons in possession of slaves were to be required, within a limited time, to deliver to the registrar, upon oath, lists of all their slaves, with particulars as specified, these to constitute the "Original Return of Slaves." At the expiration of a certain period the registrar was to close and authenticate this registration, to be known as "The Original Registry," and duplicate books thereof were to be transmitted to the Colonial Office. At the expiration of three years from the completion of the Original Registry, and periodically thereafter upon the expiration of three years, triennial returns were to be made and general abstracts thereof prepared, authenticated and transmitted to the Colonial Office. Registrars were entitled to demand a fee for the registration of every return and for every slave named in such return. A fine was imposed for falsely returning as a slave belonging to any person the name of any slave or pretended slave not so belonging. There were detailed regulations for the transfer of slaves from one British colony to another, in order to prevent "the fraudulent introduction and registration of Slaves brought from Africa or Foreign Colonies, under pretense of their having been brought from a British Colony," and the

penalty for exporting slaves from one British colony under an actual or alleged destination to another, without certificate from the registrar, was forfeiture of the slaves and the vessel in which they were exported. After the closing of the Original Registry no person was to be held in slavery unless duly registered, and every person not so registered was to be deemed free, fugitives from other colonies excepted. A "General Registry of Colonial Slaves" was to be established in London and a "General Registrar of Colonial Slaves" appointed, to whom all duplicates and abstracts of the original and the triennial registries were to be delivered; and after a limited time it was to be unlawful for any British subject within the United Kingdom to purchase, contract for, or lend money on the security of slaves in the colonies, unless they were duly registered in the General Registry. The most essential provision of the bill, in the opinion of those who supported it, was not that it required the master to make returns of his slaves, but that it made it to his interest to do so by providing that his title to them in the future should depend upon their being registered, for it decreed that in any suit to prove ownership it must be shown that the person claimed as a slave had been duly enrolled as such.[28]

* * *

The opposition to the Registry Bill was immediate and intense.[29] The West India "Interest," as it was called, at once took alarm. Resolutions condemning the measure were adopted at a General Meeting of West India Planters and Merchants in London on June 13, the very day on which

Wilberforce moved for leave to introduce the bill, and the Standing Committee of the association was directed "to omit no lawful and constitutional means of averting the many calamities to the Mother Country, and the Ruin to the Colonies, with which the interference in question is pregnant." [30] On July 3, before the bill had passed first reading, the Standing Committee adopted resolutions advising the West India legislatures to protest against it and to make their sentiments known to the British Government; and copies of these resolutions were duly forwarded to the colonies and also to West India committees in other cities in Great Britain, for the purpose of promoting opposition to the bill.[31]

The colonial legislatures were not slow to express themselves. St. Vincent, in the Leeward Islands, seems to have been the first to take action. On October 13, 1815, the Legislature unanimously adopted resolutions protesting against the bill on constitutional grounds and denying that illicit importation of slaves into the island had taken place, but expressing willingness to concur in measures that might be deemed necessary to prevent such importation in the future, and announcing that it would immediately prepare a bill for the registry of slaves which would embody all of the provisions of the Wilberforce bill that were consistent with the safety of the free inhabitants of the colony and the unenlightened minds of the slaves. It also proposed that communication should be entered into with the other West India legislatures to arrange for concerted opposition.[32]

By far the largest of the British West Indies, both in area and in population, and much the most important, was Jamaica. On October 20, 1815, the House of Assembly appointed a committee to take into consideration the Registry Bill and the information relating to it which had been transmitted from England by the agent of the colony, and "to report their opinion of the measures which ought to be adopted by the house to prevent the said bill being passed into a law." On October 31 the House adopted, with certain amendments, the report of the committee and a series of accompanying resolutions. The latter declared, in effect, that the Registry Bill was an unconstitutional interference by Parliament in the internal affairs of the colony, asserted that the Abolition Laws had been accepted in good faith, and pledged the House to establish by evidence that no illicit trade in slaves had been carried on in Jamaica.[33]

Reports and resolutions of similar character were adopted by both branches of the Legislature in Antigua, Dominica, Nevis and Tobago, and by the House of Assembly in the Bahama Islands and Barbados.[34] An examination of these documents sustains the statement made by a member of the Assembly of Barbados, that "the principal objections in the minds of the Colonists to the passing of the Registrar Bill rest upon two distinct grounds, first, as to the right of the British Parliament to legislate for the Colonies; and secondly, as to the specific enactments of the Bill itself." [35]

In Jamica an effective means of furthering agitation was found in parish meetings, at which resolutions of protest

against the bill were adopted. The following resolution, passed at a meeting of the Parish of Port-Royal on December 18, 1815, will serve as typical of them:

Resolved, That we cannot recognize any laws that may be contemplated by the Parliament of Great-Britain for the internal government of this island — not only because they have no manner of right to interfere in this respect with us, but because it is altogether impossible that any men, or set of men, however enlightened, can be competent to the task of legislating, justly and suitably, for a people 5000 miles distant from them, whose local difficulties they are either wholly unacquainted with, or obstinately blind to.[36]

Copies of the reports and resolutions adopted by the colonial legislatures were forwarded to the colonial agents in England, with instructions to do all in their power to prevent the passing of the bill.[37] The agents seem to have acted with great energy,[38] and two of them, Gibbes Walker Jordan and Joseph Marryat, agents for Barbados and Grenada respectively, prepared elaborate pamphlets against the bill.[39] The latter was a member of the House of Commons, as were Anthony Browne, agent for Antigua and Montserrat, and Charles Nicholas Pallmer, chairman of the West India Planters and Merchants. Marryat and Pallmer were the leading antagonists of the bill in Parliament.

The West India Planters and Merchants continued to be the head and front of the opposition in England. Resolutions against the bill, framed by a sub-committee of the Standing Committee, were adopted by the latter and by a General Meeting of Planters and Merchants held in London on January 19, 1816.[40] A managing committee was ap-

pointed to give effect to the resolutions and to prepare a petition to the House of Commons. Copies of the resolutions were transmitted to members of Parliament and to the West India committees in the outports, with the advice that they "lose no time in expressing their opinions respecting the Bill now depending in Parliament," "join in petitioning the House of Commons against the said Bill," and instruct their members "to give every opposition to its passing into Law." [41]

In addition to the pamphlets by Jordan and Marryat, already mentioned, many others issued from the press which contributed materially to strengthening opposition to the bill.[42] Over and over again the statement was made that it was intended as the beginning of a new system of parliamentary interference in colonial affairs and that the ultimate purpose of those who supported it was to emancipate the slaves. "Great diligence is used in cultivating a support for us in Parliament, and I am glad to say that we make a progress," the agent for Jamaica wrote in March, 1816.[43] "The stream runs most strongly against us," Wilberforce recorded in his diary under date of February 14, 1816,[44] though at a conference between some of the leading supporters and opponents of the bill, held two weeks later, he intimated that he would proceed with the measure unless the West Indies gave assurance that the objects which he and his friends sought to attain would be accomplished by other means.[45]

On May 15 the Colonial Secretary, Lord Bathurst, called a meeting of West India agents at the Colonial Office. He

told them that though there had been no proof of the violation of the Abolition Laws in the West Indies, the termination of war with France would afford opportunities for such violation in the future. While not abandoning the right of Parliament to legislate internally for the colonies, the Government, he said, believed this right should be resorted to only in cases of necessity, in which the colonial legislatures would not act. He announced that it was proposed to instruct the West India governors to recommend to their legislatures the enactment of registry bills of their own, and called upon the agents to cooperate. To this all agreed. Jordan remarked that the Legislature of Barbados had already pledged itself to take such action, but that it would have unfortunate effects upon the colonial legislatures if Wilberforce persisted with his bill. It was accordingly agreed that Lord Bathurst should try to persuade him to withdraw it — without conceding, however, that Parliament was not competent to legislate in the premises. After some hesitation Wilberforce agreed not to proceed with the bill during the session of 1816.[46]

In a circular letter of June 28, 1816, to the West India governors Lord Bathurst informed them that the reintroduction of the Registry Bill during the session of that year had been suspended mainly in consequence of assurances given by the Government that the West India legislatures were prepared to pass local registration acts. He was careful to say, however, that Parliament's reluctance to act had not arisen "either from any doubt of the expediency of some measure being adopted of this description, or of the

Right of Parliament to require a Registration of Slaves in the Colonies, and to enforce obedience to such a provision." He instructed the governors to urge their assemblies to pass local acts, similar in principle to Wilberforce's bill. They were to make it clear, however, that the British Government had no intention of proposing the emancipation of the slaves and was not under the impression that there had been any systematic evasion of the Abolition Laws in the colonies.[47] Before 1820 local slave registration acts had been passed in every British colony in which slavery existed, except Bermuda.[48] They differed in various respects, however, from Wilberforce's bill, most notably in not requiring registration as evidence of a title to property in slaves. From the point of view of the abolitionists these acts were inadequate, and a committee of the African Institution reported in 1820 that the experiment of leaving slave registration to the colonial legislatures had definitely failed.[49]

The West Indians made the most of a slave insurrection that broke out in Barbados in April, 1816, and was undoubtedly connected with the Registry Bill, for the purpose of discrediting that measure. The abolitionists denied that they were to blame for the outbreak and tried to fasten responsibility upon the planters. The abolitionist view was thus stated by Sir Samuel Romilly in his diary:

> That the late insurrection at Barbados was at all connected with the Registry Bill has not been satisfactorily shown; but those who pretend that the Bill was the cause of it, themselves allege that the Bill was misunderstood by the slaves, who supposed that it was immediately to make them free. Such a misconception, if it exists has, it is

evident, originated with the West Indians. They have themselves, by their exaggerations, connected the notions of a registry and of emancipation; and they have most unintentionally, by foolishly foretelling, really caused this calamity.[50]

A committee of the Assembly of Barbados, after examining witnesses, indignantly denied that the colonies were responsible for the association of emancipation with registration in the minds of the slaves, and pointed out that the Report of the African Institution, advocating a registry of slaves, had avowedly looked forward to the future extinction of slavery.[51] On the whole, the insurrection strengthened the West India cause and, for the time, correspondingly weakened the abolitionists.[52] On June 19, 1816, on motion of Mr. Pallmer, the House of Commons voted to present to the Prince Regent an address asking him to direct the governors of the West India colonies to proclaim his "highest displeasure at the daring insurrection . . . . in the island of Barbados," and a few days later the House of Lords took similar action.[53]

It was evident that there was no likelihood that the Government would change its attitude toward the Registry Bill, and post-war conditions at home claimed the attention of Parliament and the public. "I have for some time been unwillingly yielding to a secret suggestion that it would be better perhaps to lie upon our oars in the Registry Bill, and West Indian cause," Wilberforce wrote to Macaulay in January, 1817. He added:

When parliament meets, the whole nation, depend upon

it, will be looking up for relief from its own burthens, and it would betray an ignorance of all tact to talk to them in such circumstances of the sufferings of the Slaves in the West Indies. We should specially guard against appearing to have a world of our own, and to have little sympathy with the sufferings of our countrymen.[54]

When the parliamentary session of 1817 opened, the abolitionist leader was immersed in the labors of a secret committee that had been appointed to investigate sedition, and we hear no more of his Registry Bill.[55]

* * *

The most comprehensive constitutional argument advanced against the Registry Bill was that the right to legislate for the colonies in their internal affairs was vested in the colonial legislatures exclusively. Whatever may be thought of its merits or demerits, students of the American Revolution will at once recognize that such a claim was not a novelty.

The emphasis that has been placed upon taxation as a cause of the dispute between Great Britain and the continental colonies has perhaps tended to obscure other phases of that great controversy. Early in its course, in protests evoked by the Stamp Act, several of the colonial assemblies coupled "internal polity" with taxation as a subject of exclusive local regulation.[56] The fourth of the famous Virginia Resolves of May 30, 1765, declared that the people of Virginia had always "enjoyed the inestimable right of being governed by such laws, respecting their internal polity and taxation, as are derived from their own consent, with the approbation of their sovereign or his sub-

stitute."[57] In the original draft of the resolutions contained in the Declaration and Resolves of the First Continental Congress, adopted on October 14, 1774, the right of internal legislation was claimed for the colonial legislatures exclusively in these words:

> That the power of making laws for ordering or regulating the internal polity of these Colonies is, within the limits of each Colony, respectively and exclusively vested in the Provincial Legislature of such Colony; and that all statutes for ordering or regulating the internal polity of the said Colonies, or any of them, in any manner, or in any case whatsoever, are illegal and void.[58]

As modified and somewhat softened in phraseology, though not in intent, this appears in the Declaration and Resolves in the following form:

> That the foundation of English liberty, and of all free government, is a right in the people to participate in their legislative council; and as the English colonists are not represented, and from their local and other circumstances, cannot properly be represented in the British parliament, they are entitled to a free and exclusive power of legislation in their several provincial legislatures, where their right of representation can alone be preserved, in all cases of taxation and internal polity, subject only to the negative of their sovereign, in such manner as has been heretofore used and accustomed.[59]

The rest of the resolution goes beyond a claim of exemption from parliamentary authority in internal affairs, and implies a questioning, if not a denial, of Parliament's right to legislate, even externally, for the colonies.[60] Indeed, by this time the more radical leaders of public opinion in

America, like John Adams, Thomas Jefferson and James Wilson, had taken the ground that Parliament had, of right, no authority whatever over the colonies.[61]

The West India planters, in close commercial relations both with Great Britain and the continental colonies, watched with lively interest and no little apprehension the progress of events in the controversy that threatened to disrupt the Empire and bring economic disaster upon themselves. They were familiar with the radical American constitutional claims, which many if not most of them regarded as valid. In a "Petition and Memorial" addressed to the King, adopted on December 23, 1774, by a vote of sixteen to nine, the Assembly of Jamaica virtually took its stand beside the Continental Congress.[62] It declared that Parliament had no right to legislate for the colonies, and that the colonists were not, and ought not to be, bound "by any other laws, than such as they have themselves assented to." Acts of Parliament for the regulation of trade had, the petitioners admitted, been "received" in the colony of Jamaica, but, they said, "though we received those regulations of trade from our fellow subjects of England . . . . we did not thereby confer on them a power of legislating for us, far less that of destroying us and our children, by divesting us of all rights and property." They were conscious of the benefits to the whole Empire that had resulted from parliamentary regulation of commerce prior to 1760, and, like the Continental Congress, they declared for themselves and their constituents that they freely consented to "the operation of all such acts of the British

parliament, as are limited to the regulation of our external commerce only, and the sole objects of which are the mutual advantage of Great Britain and her Colonies.'' Like the Continental Congress, also, the Jamaica Assembly derived the rights of the colonists from the principles of the ''English Constitution'' and from royal grants guaranteeing to the colonists the rights of English subjects.

The position taken by the West India colonists in their protests against the Registry Bill was less extreme and perhaps less logical than that of the Continental Congress and of the Jamaica Assembly in 1774, for they conceded that Parliament had a constitutional right to regulate their external commerce. Their claim finds an antecedent analogy in the argument of John Dickinson in his *Essay on the Constitutional Power of Great Britain over the Colonies in America*, published in 1774.[63] In this tract Dickinson denied both that Parliament possessed unlimited authority over the colonies and that it possessed no authority at all over them. Distinguishing between internal and external legislation, he held that the former belonged to the colonial legislatures exclusively. ''In our provincial legislatures, the best judges in all cases what [sic] suits us . . . . subject to the controul of the crown, as by law established, is vested the *exclusive right of internal legislation.*'' A parliamentary power of internal legislation for the colonies he declared to be ''equally contradictory to humanity and the constitution, and illegal.'' The power to regulate trade, on the other hand, was, in his opinion, ''legally vested in parliament, not as a supreme legislature over these colonies, but as the

supreme legislature and full *representative* of the parent state, and the only judge between her and her children in commercial interests, which the nature of the case, in the progress of their growth, admitted." In reaching these conclusions Dickinson paid his respects to precedents, but his main reliance was upon the doctrine of "natural law" as embodied in the "English Constitution." "Submission to unjust sentences," he wrote, "proves not a *right* to pass them," and "precedents to overthrow *principles*, to justify the *perpetual* oppression of *all*, and to *impair the power of the constitution*, though a cloud of them appear, have no more force than the volumes of dust that surround a triumphal car. They may obscure it; they cannot stop it." [64]

Ten years after Great Britain had recognized the independence of the United States, Bryan Edwards brought out his *History of the West Indies*, in which he expressed opinions regarding the constitutional authority of Parliament that were in keeping with those of Dickinson and were undoubtedly prevalent among the West India planters, the class to which the author belonged. The authority of Parliament, according to Edwards, was not unlimited, even within the realm. On the contrary, it was limited by the fundamental laws embodied in the English Constitution, which he defined as "a system of principles transmitted down to us from time immemorial, and established into common rights at the price of the best blood of our ancestors." These rights included "the rights of personal liberty and private property, the mode of trial by jury, the freedom of worshipping our Creator in what manner we think best,

a share in the legislature, and various other rights, coeval with the government." If the legislature should subvert these rights, it would be guilty of usurpation, and the people would be justified, in last resort, "by the laws of God and nature," in resuming the trust which had been violated. As the authority of Parliament was not unlimited, even within the realm, where the people were represented, much less was it supreme in all cases whatsoever over the colonies, as had been asserted in the Declaratory Act of 1766. The colonists owed allegiance to the King, but not to the Lords and Commons of Great Britain.[65] Edwards conceded, however, that the colonies were "subordinate" to Parliament and said that in matters "to which the local jurisdiction of any one particular colony is not competent, the superintending control of Great Britain is necessarily admitted." On exactly what subject Parliament had a right to legislate for the colonies he did not attempt to determine. It would not be difficult, he said, "to point out many cases, and to imagine others, wherein the authority of Parliament has been, and may again be, constitutionally exerted in regard to the colonies, without abolishing every restriction on the part of *governors*, and extinguishing every right on the part of the *governed*. Previously excluding, however, every idea of its interposition in the concerns of internal legislation, and all other matters to which the colonial assemblies are sufficiently competent." [66]

In the debate in the House of Commons on Wilberforce's motion for leave to introduce his bill, the constitutional aspects of the measure were touched upon, but none of its

opponents categorically denied the right of Parliament to pass it. Anthony Browne observed that it involved "the doubtful and hazardous question of the right of this country to legislate for the internal and domestic concerns of the colonies,"[67] while Joseph Marryat declined to enter into the question of the constitutional rights of the colonies, though he pointedly remarked: "We ought to recollect that by persisting in the question of right we lost America."[68]

The West India assemblies were more explicit. Their main constitutional objections to the bill were, first, that it was a case of internal legislation, and second, that it violated the pledge given by Parliament in 1778 not to impose taxes on any British colony in North America or the West Indies except for the purpose of regulating trade.[69] The Assembly of Jamaica, in its resolutions of October 31, 1815, declared that the bill assumed "a right of legislation within the island upon a subject of mere municipal regulation and internal police," exercised "a power over the estates and property of the inhabitants," imposed "the most grievous penalties and forfeitures, to be inflicted at the will of a single officer, without trial by jury," and levied "fees and gratuities to the use of the said officer and others, on the inhabitants, not given or consented to by their Representatives in General Assembly." By which enactments, it added, "not only the constitutional right of internal legislation is infringed, but the pledge, in respect of taxation, given to the Colonies by the Statute of 18 Geo. 3, c. 12, is violated."[70]

One of the resolutions adopted by the Legislature of St.

Vincent on October 13, 1815, reads: "That they consider the interference of the Imperial Parliament in the internal regulations of the Colonies, as an infraction of those original rights under which British subjects were induced to settle in them." [71]

The Assembly of the Bahama Islands, in resolutions passed on December 28, 1815, asserted that the Registry Bill, if enacted,

would be in direct violation of the most valuable constitutional rights and privileges of the Colony, inasmuch as it would introduce a minute system of internal regulation with regard to the private concerns of every individual in these Islands, and impose sundry taxes, assessments and penalties on the Inhabitants generally, by the Authority of Parliament alone; and that any attempt to put the provisions of the same into effect in this Colony, would not be more unjust and unconstitutional in principle, than oppressive and ruinous in practice.[72]

The Assembly of Barbados, in resolutions adopted on January 17, 1816, declared:

that the *sole* right of imposing taxes on the inhabitants of this Island, or of passing laws for internal regulation, is now, and hath been for a length of time past, vested in the House of Assembly with consent of the Council, and of the King or his Representative here for the time being: a right which can never be safely or advantageously exercised by those who are utter strangers to these Colonies, and must necessarily want that local information which is so essential to the important work of legislation.[73]

One of a series of resolutions framed by a joint committee of the Legislature of Dominica and approved by the Coun-

cil and Assembly on February 14, 1816, reads in part as follows:

> Your Committee solemnly deny and hereby publickly protest against all right in the British Parliament to legislate internally in the Colonies. They contend that no such right ever did or could exist in any Colony which enjoys an independent Legislature.[74]

In Tobago a joint committee of the Legislature, whose report was approved by both Houses in April, 1816, declared that it beheld with dismay

> this Commencement of Interference on the Part of the Parliament of Great Britain, not only in Matters of Internal Regulation and Police, and coming decidedly within those enactments . . . . which the Legislature of Tobago are of Right allowed exclusively to exercise, but also imposing Taxes, and inflicting Pains, Penalties, and Forfeitures, upon the Inhabitants, with Respect to their Property or Conduct, contrary to the aforesaid Proclamations, and contrary to the express Declaratory Law of the *18th Geo. III. chap. 12.*[75]

To support their contention that Parliament had no right to legislate for them internally, the West Indians and their friends relied mainly upon the doctrine of the "inherent rights" of British subjects and the principles of the "English Constitution." The resolutions of the Jamaica Assembly, referred to above, affirmed that

> the most important of the rights, privileges, immunities, and franchises, which are inherent in British subjects as their birthright, and have by them been brought to this island, is to consent to those laws by which they are to be governed, by the exercise of the right to send their Repre-

sentatives to the said General Assembly, who, with his Majesty, and the Council, can, and of right ought to do, all such acts and matters of legislation, respecting the internal government of the island, as the Imperial Parliament can do within the United Kingdom of Great Britain and Ireland.

A committee of the Assembly, in a report adopted unanimously by the House on December 20, 1815, referred to a proclamation of Charles II, to the effect that all persons born in Jamaica should have the same privileges as free-born subjects in England, "as declaratory of inherent rights, which . . . . his Majesty could not confer nor take away." No other authority than that of the King (represented in Jamaica by the Governor), Council and Assembly, the committee asserted, "could have any right, on the principles of the British constitution, to interfere in our internal legislation." [76]

The Assembly of the Bahama Islands affirmed:

that the constitutional Rights of Free British Subjects are indefeasible without their own consent, and that they are equally entitled to the same whatsoever part of His Majesty's Dominions they may inhabit, unless in such parts thereof, as may have been originally settled on different principles expressly declared, understood, and by the very act of settlement explicitly acquiesced in, on the part of the settlers themselves.[77]

The doctrine of "inherent rights," guaranteed by the "English Constitution," was set forth in various pamphlets that were elicited by the Registry Bill. "To the islands, settled by the English . . . . the settlers," wrote one anony-

mous controversialist, "carried with them the unalienable birthright and privileges of British subjects, namely, that no power shall legislate for them, or tax them, without their consent. . . . . The birthright of an Englishman no British Parliament can take away.[78]

The West India doctrine was thus emphatically stated by Gibbes Walker Jordan, the agent for Barbados, in his pamphlet to which reference has already been made:

When the King, by virtue of his Royal prerogative . . . . constitutes and convenes a Colonial Parliament or General Assembly, composed of his representative, a council duly appointed by himself, and representatives freely elected by the inhabitants and freeholders thereof, such Parliament or General Assembly possesses all the rights, privileges and powers of a Parliament, and of internal Legislation, to the exclusion of all other Parliaments or Legislative Bodies constituted and convened by the same royal powers for any other separate part or district, or united parts or districts of the realm. . . . . Of the Parliaments of Great Britain, of Ireland before the Union, of Jamaica, Barbados, Grenada, each created and convoked by the same power for its particular district, none can possess the right of legislating for or within the jurisdictions of the others.[79]

Supporters of the Registry Bill admitted that Parliament had usually confined its legislation for the colonies to the regulation of their trade and navigation, but insisted that it possessed, of right, full legislative authority over them, except as limited by itself in regard to taxation by the Act of 1778. To concede the validity of the colonial claim to an exclusive right of internal legislation would be, they argued, to recognize the existence of an *imperium in imperio* and

would place the colonies in the same position of independence with relation to Great Britain as that in which Hanover stood. They repudiated the sharp distinction which the West Indians sought to draw between internal and external legislation, and pointed out that Acts of Parliament for the regulation of colonial trade often required supplementary internal regulations for their enforcement. The Registry Bill they held to be a case in point, its purpose being to give effect to the abolition of the slave trade.[80]

As to precedents, they pointed to various Acts of Parliament applying to the colonies passed during the eighteenth century, where there had been no purpose of regulating trade. According to Stephen, who was a Master in Chancery, Parliament's right to legislate internally for the colonies had been "perseveringly asserted and maintained," and Brougham, the future Lord Chancellor, declared it to be "clear of all doubt." Wilberforce went so far as to say that the paramount right of Parliament had been at all times acknowledged.[81] The friends of the bill referred, in particular, to a provision of the Navigation Act of 1696 which declared null and void all laws in force in the colonies if they were repugnant to its enactments, or to earlier Acts of Parliament mentioned in it, "or to any other law hereafter to be made in this kingdom, so far as such law shall relate to and mention the said plantations"; and they made much of the Declaratory Act of 1766, which declared that Parliament had "full power and authority to make laws and statutes of sufficient force and validity to bind the colonies and people of America . . . . in all cases whatso-

ever." Even the Renunciation Act of 1778 was cited to show that Parliament retained general legislative authority over the colonies.[82]

The contention advanced by some of those who supported the Registry Bill, that it was to be regarded merely as a supplementary measure necessary to enforce the Abolition Laws, and was therefore justified, even if it were granted that Parliament had no right to legislate internally for the colonies, was considered by the West Indians as mere sophistry.[83] In the words of the report adopted by the Assembly of the Bahamas:

> the Bill .... is said not to contain matter of internal regulation in regard to the Colonies; for that its Object is merely to give effect to the laws abolishing the African Slave trade; and therefore that it can be regarded only as a part of the general maritime or foreign commercial system, to regulate which the Right of the mother country is indisputable in the Colonies; but if the maritime powers of Parliament are thus to follow every importation into the heart of every Colony .... it would be difficult to say what Class of the Colonists, their possessions or concerns, would not, on principles equally sound, come fairly within the same jurisdiction.[84]

The West Indians would have agreed heartily with Dickinson that precedents cannot overthrow principles, for in their view even acquiescence by the colonies in unconstitutional Acts of Parliament did not and could not make them valid. The exclusive right of the colonial legislatures to regulate internal affairs was not impaired, they insisted, "by petty violations of their general right of Legislation, because not always nor captiously resisted."[85] Still the

challenge of precedent was one that could not safely be declined, and attempts were made to interpret precedents in harmony with the West India claims. Thus the special committee of the Jamaica Assembly, to which we have referred, declared that the Navigation Act and the statutes mentioned in it related exclusively to trade, that when it was passed Parliament had not yet undertaken to interfere in the internal affairs of the colonies, and that, therefore, the fair interpretation of the act was that it contemplated future parliamentary legislation for the colonies on the subject of trade only.[86]

The unambiguous language of the Declaratory Act could not be explained away by interpretation, but there is no doubt that the West Indians did not regard that statute as good law. In comment upon it the special committee of the Assembly of the Bahamas, in its report referred to above, had this to say:

> That the King, Lords and Commons of the realm have the Power to do what they please within, or even beyond the limits of that realm, certainly cannot be questioned, so long as they have a physical force at command, competent to support their pretensions. But whether Parliament hath or ever had that power as a matter of "Right," involves a Constitutional Question, on which the opinion even of Parliament itself was the opinion only of a party concerned, assuming authority to decide in its own favor.[87]

The constitutional doctrine set forth in the Declaratory Act, the committee continued, had been resisted by those against whom it was directed, and if any regard was to be

paid to the arbitrament of arms, the judgment of Parliament in this case might be considered to be reversed.

Where supporters of the Registry Bill found in the Renunciation Act of 1778 evidence that Parliament still retained general legislative authority over the colonies, some of its opponents professed to see in it a relinquishment of the claim to such authority. In the resolutions of the Legislature of Dominica, referred to above, it was declared that even if Parliament had previously possessed the right to legislate internally for the colonies, that right "was solemnly renounced by His Majesty, with consent of Parliament, in the year 1778." [88] Jordan expressed what must have been in the minds of those who framed this resolution when he said that the purpose of Parliament in claiming for itself the general right of legislating for the colonies had been "to support a claim to the particular right of taxation," and that the general claim "was fairly considered as abandoned" when, in 1778, the particular claim was given up.[89]

The contention was advanced on behalf of the West Indies that their relation to Great Britain was identical with that of Ireland to Great Britain before the Union of 1800. This was emphasized especially by Jordan, who undertook to show that the principle of the Renunciation Act of 1783 applied to the colonies. He said that this act conceded to the people of Ireland "the right claimed by them of being legislated for only by their own Parliament, declaring it to be a right, established and ascertained for ever, and

thus establishing and ascertaining it for ever, for all the dependencies and Colonies of Great Britain similarly circumstanced.'' [90] He was unable to prove, however, that the colonies and Ireland were ''similarly circumstanced.'' If they were, it might properly have been asked, by what right could Parliament legislate externally for the former, as the West Indians admitted that it had a right to do, after it had renounced all claim to do so for the latter? Jordan's statement that Parliament had the right to regulate the external commerce of the colonies because Britain ruled the ocean could scarcely commend itself to constitutional lawyers.[91]

The question of whether the Registry Bill was in violation of the Renunciation Act of 1778 depended upon whether the payments and fees for which it provided were to be regarded as ''duties, taxes or assessments'' in the meaning of that statute. On this point the West Indians were most emphatic. According to the report approved by the Assembly of the Bahamas, the expenses of the registry were to be defrayed by ''a direct tax on the poll of every slave . . . . throughout every plantation and settlement in the West Indies; to be collected triennially under the name of fees; fees for entries, fees for certificates, fees for copies of entries, fees on affidavits, fees for searches, and numberless other incidents officially connected with the proposed system.'' These fees, by whatever name they might be called, and whether the money collected was to go into the treasury or into the pockets of the registration officials, would constitute, the report said, ''a direct internal tax.'' [92]

In Jamaica it was estimated that the expense of the original registry in that colony alone would exceed £40,000, to say nothing of the cost of travel which registrants would have to bear.[93] The Legislature of Dominica protested against the burden of "direct taxation" which the bill proposed to lay upon the island, and the Legislature of Tobago held that the bill could not be reconciled with the Act of 1778.[94] The abolitionists were evidently unable to convince the Government that the West India argument respecting the fiscal character of the bill was entirely fallacious, for Lord Bathurst, in his circular despatch to the West Indies, referred to above, said that "if some clauses of the Slave Register Bill, as it was introduced at the close of the last Session, transgress the limits which Parliament prescribed to itself by that Act [i.e., the Act of 1778], no difficulty would arise in making such alterations as would obviate that objection, and leave the Bill equally efficient." [95]

The controversy over the Registry Bill, then, resulted in a virtual victory for the West Indies. It is true that the validity of their constitutional claims was not conceded — on the contrary, it was denied — by the British Government and Parliament. But the withdrawal of the Registry Bill was a greater victory for the West Indies than the repeal of the Stamp Act had been for the continental colonies, for the latter, it will be remembered, was accompanied by a statutory declaration of the unlimited sovereignty of Parliament over the colonies. It is not strange, therefore, that the West India claims were reasserted from time to time after the passing of the agitation of 1815-16.

Early in the year 1823 the anti-slavery movement in England entered upon its second stage. Prior to this, as has been said, the abolitionists had directed their efforts primarily to securing and enforcing the abolition of the slave trade and had disclaimed the intention of interfering with slavery itself. From the beginning of their agitation, it is true, they had hoped that the abolition of the trade would lead to improvements in the condition of the slaves in the British colonies, and that in time an unfree laboring population would be transformed into a free peasantry. But they had been content, generally speaking, to leave the work of amelioration to the slave-owners' perception of what their own interests required, public opinion in the colonies, and voluntary action by the colonial legislatures. More than once they had declined to adopt proposals for emancipation, thinking that to do so might prove fatal to their immediate object. But as the years passed they were disappointed in their hope of reform by colonial action. Little or nothing, to their way of thinking, was done by the West India legislatures toward bettering the state of the slaves. Some laws were passed avowedly for this purpose, but the abolitionists regarded them as utterly inadequate, or worse, and questioned the good faith of the legislatures in enacting them.[96] Before the opening of the parliamentary session of 1823 several of the abolitionist leaders met in what Wilberforce called "a secret cabinet council" to agree upon a plan of action. They decided that the time had come to inaugurate a crusade for the emancipation of the slaves throughout the British Empire, and that it must be proclaimed by

the man whom all the world looked upon as the foremost champion of the Negro race.[97] Accordingly, Wilberforce prepared a manifesto, which was published in March, 1823, with the title, *An Appeal to the Religion, Justice, and Humanity of the Inhabitants of the British Empire, in behalf of the Negro Slaves in the West Indies.* It called for immediate action by Parliament for the purpose of improving the condition of the slaves and eventually abolishing slavery in all the British dominions. Public opinion was at once stirred, associations for the amelioration and ultimate abolition of slavery were formed, and a flood of anti-slavery petitions poured in upon Parliament during the session of 1823.[98]

On May 15 Thomas Fowell Buxton,[99] Wilberforce's chief lieutenant and heir apparent to the leadership of the anti-slavery cause, moved the following resolution in the House of Commons:

> That the State of Slavery is repugnant to the principles of the British constitution, and of the Christian religion; and that it ought to be gradually abolished throughout the British colonies, with as much expedition as may be found consistent with a due regard to the well-being of the parties concerned.[100]

In his opening speech he took pains to make it clear that though the total extinction of slavery was his ultimate object, he was not proposing its immediate abolition, but rather such "preparatory steps" as by "slow degrees" would lead to its eventual disappearance. More specifically, he proposed that certain definite reforms should be made

in the condition of the slaves, and, of even greater importance, that all children of slave parents, born after a date to be set, should be free from birth.[101]

Following Buxton in the debate, Canning, as spokesman for the Government and leader of the House of Commons, presented the following resolutions as a substitute for the abolitionist motion:

1. That it is expedient to adopt effectual and decisive measures for ameliorating the condition of the slave population in his Majesty's colonies.
2. That, through a determined and persevering, but at the same time judicious and temperate, enforcement of such measures, this House looks forward to a progressive improvement in the character of the slave population, such as may prepare them for a participation in those civil rights and privileges which are enjoyed by other classes of his Majesty's subjects.
3. That this House is anxious for the accomplishment of this purpose, at the earliest period that shall be compatible with the well-being of the slaves themselves, with the safety of the colonies, and with a fair and equitable consideration of the interests of private property.[102]

In explaining the action that would be taken with regard to these resolutions, if they were approved by the House, Canning intimated that in those colonies in the West Indies where there were no representative assemblies, the crown colonies, as they were called, the Government itself would introduce measures of amelioration. In the others, the "legislative colonies," it would look to the colonial legislatures to give effect to the resolutions by enacting appropriate laws. As an imperial statesman Canning was a

disciple of Burke. While he believed in what he called on another occasion "the transcendental power of parliament over every dependency of the British Crown," he regarded this power as "an *arcanum* of empire, which ought to be kept back within the *penetralia* of the constitution." It existed, but in his opinion it should be "veiled," and "brought forward only in the utmost extremity of the state, where other remedies have failed to stay the raging of some moral or political pestilence." [103] The Government, he said, had a right to expect "a full and fair cooperation" from the West India legislatures. But as this might not — the abolitionists insisted that it would not — be forthcoming, he added, in words which may have been intentionally inexplicit, that "any resistance which might be manifested to the express and declared wishes of parliament, any resistance . . . . which should partake, not of reason, but of contumacy, would create a case . . . . upon which his Majesty's government would not hesitate to come down to parliament for counsel." [104]

The abolitionists thought that all experience had shown that the West India legislatures would do nothing effective towards accomplishing the purposes of Canning's resolutions. Measures of amelioration, Wilberforce said, "must not only be recommended strongly to the colonial assemblies, but the government at home must see them carried into effect." Brougham professed himself skeptical of "any real and solid advantage to be derived from the resolutions . . . . which refer the matter to the colonial assemblies." He added: "These legislatures may pretend to meet fully the

wishes of parliament, and yet may do nothing effectual."[105]

The outcome of the debate was that Buxton withdrew his motion, and Canning's resolutions were adopted without a division. Neither the abolitionists in the House nor those members who spoke for the West India interest were fully satisfied, but both found something to be thankful for. On the one hand, the Government and the House of Commons now stood pledged to ultimate emancipation. On the other hand, the authority of the colonial legislatures was not to be overridden except in last resort, and in the work of amelioration due regard was to be paid to the safety of the colonies and the interests of private property. While Canning declared that he abjured the principle of perpetual slavery, he hastened to add that he was not prepared to state in what way he would set about the work of eventual emancipation.[106] Upon his resolutions, which were adopted by the House of Lords on March 7, 1826,[107] hung all the law and the prophets of Slave Amelioration.

The first step in giving effect to the resolutions was taken on May 28, 1823, when Lord Bathurst, the Colonial Secretary, proposed to the governors of the crown colonies of Demerara and Berbice, as a preliminary installment of amelioration, that the authorities in those colonies should abolish the punishment of female slaves by flogging and prohibit the use of the whip in the field, either as a means of compelling the slaves to labor or as an emblem of authority over them, intimating plainly that if such action was not taken an order in council for the purpose would be issued.[108]

On the same day a circular letter was sent to the gov-

ernors of all the "legislative colonies" in the West Indies, enclosing Canning's resolutions and the Demerara despatch, and instructing them to recommend to their legislatures the adoption of measures similar to those proposed for Demerara. They were to impress upon the colonists that it was most desirable that the assemblies should be zealous in the work of reform and that regulations should be "spontaneously adopted" which would carry out the principles of the resolutions of May 15.[109] By a despatch of July 9 the governors were further instructed to urge upon their legislatures the necessity of providing immediately for a number of specific reforms, including admission of the testimony of slaves in court, encouragement of marriage among them, removal of obstacles to their manumission, prevention of the break-up of their families through sale in satisfaction of their masters' debts, establishment of savings banks for their benefit, and abolition of Sunday markets so that the Sabbath might be devoted to rest and religious and moral instruction.[110]

Though the resolutions adopted by the House of Commons had, of course, no legislative effect, Canning's somewhat enigmatic announcement of what would happen in case of contumacious resistance on the part of the colonial legislatures seemed to the West Indians, as it did to the abolitionists, to convey a distinct threat that in such event Parliament's legislative power over the colonies would be invoked. Its right to pass laws on the subject of slave amelioration was not openly disputed by any of its own members,[111] but the colonial assemblies, as we have seen, had

emphatically denied its constitutional right to interfere in their internal affairs. Since they professed to be loyal subjects of the King, the West Indians could not object on constitutional grounds to legislative recommendations by the governors, who were the King's representatives, provided the legislatures were free to adopt or reject such recommendations at their discretion. But when it was understood that the recommendations were backed by a threat of action which the colonists regarded as unconstitutional, a resistance that might be considered contumacious in England would be viewed in the colonies as no more than a manly assertion of constitutional rights.[112]

The response of Jamaica to the urgent recommendations of the British Government was especially important, both because that colony contained almost as many slaves as the rest of the British West Indies combined,[113] and because its attitude, whether compliant or defiant, would have great influence upon the other islands. In the early autumn of 1823 resolutions of protest against British interference in behalf of the slaves were adopted at parish meetings throughout the colony. Thus, in October the Parish of Kingston adopted a resolution declaring,

> That the right to legislate internally for ourselves by our own Representatives, freely and independently chosen, was one of the rights and privileges (among others) granted and assured to us, on the settlement of the Constitution of this Colony; that we have continued to enjoy the same up to the present period, having always successfully resisted the various oppressive attempts to invade them; and that any interference in our internal Legislation is a direct

violation of our acknowledged rights as British subjects, pregnant with the greatest danger to our lives and properties, and may, if successful, end in our destruction.[114]

The Parish of St. Mary resolved:

That, as free-born British subjects, we cannot in any way be bound by, or amenable to, any laws for the purpose of internal regulation but those enacted by our Governor, Council, and our own legal Representatives, and that every attempt of the Members of the British House of Commons to interfere in our local policy is an unwarrantable, tyrannical and unconstitutional infringement of our rights, and ought to be resisted by every means in our power.[115]

The Jamaica Assembly, having learned from the colony's agent in London of the resolutions of the House of Commons, appointed a committee to consider what steps should be taken.[116] In its report the committee censured the proceedings of the House of Commons and the conduct of the ministers as "a direct attempt to violate the constitution of this colony," and recommended to the Assembly "to adopt the most firm, strong, and constitutional measures to resist such attempt, and to preserve to the inhabitants of this colony those rights which have been transmitted to them from their ancestors."[117]

Having approved of this report the Assembly, on December 11, 1823, proceeded to pass a series of resolutions,[118] in which it was declared that the views of "a powerful and interested party" in England had received "the sanction of ministerial authority," and that the inhabitants of Jamaica were to be offered as "a propitiatory sacrifice at the altar of fanaticism." The second and third of these

resolutions, which express the constitutional claims of the Assembly, read as follows:

That this house, composed of the representatives of the people, are bound to guard the rights of their constituents against every endeavour that may be made to infringe upon them; They pause in awful expectation of the consequences which must result from the threatened innovation; and, whilst they wait the event, they are prepared to meet it: The blood which flows in their veins is British blood, and their hearts are animated with the same fearless determination, which enabled their ancestors to resist with success every encroachment of despotic power.

That the enactment of laws for the internal regulation of the island is exclusively the province of the local legislature, subject to the sanction and approval of his majesty: This house, however, will at all times receive with attention and respect any suggestion of his majesty's ministers relating to legislation, when offered in a consistent and becoming manner, and will be ready to adopt such regulations as can be introduced without hazard, and may appear likely to promote the welfare of the island; but the house cannot yield to any measure proposed for their consideration, when the unqualified right of rejection is denied, however specious the object may be, or however high the authority from which it emanates.

In another resolution it was agreed that a message should be sent to the Governor, assuring him that the Assembly, "if left to themselves," would be ready at all times to promote the religious and moral interests of the slaves, but adding, in words which the abolitionists, if not the British Government, were sure to regard as a manifestation of contumacious resistance, that in view of the "critical circumstances" in which the colony was placed by "the late

proceedings in the British parliament," they deemed the present moment "peculiarly unfavourable for discussions, which may have a tendency to unsettle the minds of the negro population."

Not content with passing these resolutions the Assembly on the same day adopted a Petition and Memorial to the King, which contained the following paragraphs:

> It is our duty humbly to represent to your majesty that we have taken no oath of allegiance to the imperial parliament, and that we cannot submit to the degradation of having our internal interests regulated by the commons of Great-Britain, whose powers within that realm are not superior to those which we the assembly have ever exercised within the island of Jamaica.
>
> Should your majesty's parliament proceed in their attempt to subvert our Constitution, and offer for the royal assent any act that arrogates an authority over the interior of our island, we beseech your majesty to reject the act, and, by that timely inter-position of your royal prerogative, to save us from utter ruin.[119]

A motion was made to insert a paragraph attributing many of the ills that beset the colony to the "imbecility" of the King's ministers, and another praying His Majesty to dismiss his "bad advisers," and especially Lord Bathurst, who, in the words of the motion, "from error of judgment or natural incapacity," had "used the influence of his high station, rather for the introduction of revolutionary principles" than "to confirm the quiet and content that have distinguished Jamaica."[120] Both motions, however, were defeated.

After the end of the legislative session the Duke of

Manchester, then Governor of the colony, notified the Colonial Office that no measure in the interest of the slaves, with a single exception, had been passed,[121] and that the Assembly had informed him that it found the Jamaica slave code adequate "to render the slave population as happy and comfortable in every respect as the labouring class of any part of the world."[122]

Such was the response of Jamaica to the resolutions of the House of Commons and the urgent recommendations of the British Government.

When it was learned in the Bahamas that the abolitionists were meditating some project for the extinction of slavery the commissioners of correspondence addressed a long letter of protest to the agent of the colony in London.[123] On the constitutional question of Parliament's authority over the islands they had this to say:

> What may be within the *power* of the British Parliament, it would perhaps be as difficult to define, as it might be perilous to question. But power does not always constitute right. Our Colonists, being no longer represented in the Parliament of the Mother Country, were placed by the Crown . . . . under the government of Parliaments of their own; the Mother Country reserving to herself, or her Parliament, only a sort of homage from the Colonies, in matters relating to their maritime concerns. A political right, once unconditionally conferred, never can be recalled; or the liberties even of England would be at this day enjoyed, only by sufferance of the reigning Monarch. What was *Magna Charta* itself, but a royal boon? — extorted indeed by intimidation, but perhaps on that very account, only the less binding on the bestower. The same might perhaps be said, with very little abatement of circumstance, as to the Bill

of Rights, as well as many other of those high securities for British freedom, which we have been so long in the habit of regarding with veneration. And yet, has it ever been pretended, that Parliament could constitutionally revoke those concessions? . . . . As therefore, the General Assembly of these islands was lawfully constituted by the Crown, without any manner of Parliamentary sanction, except so far as the Assembly, with the King at its head, is in itself a Parliament for all local purposes, we sincerely hope that the question may never be seriously raised as a matter of contention with the Mother-Country, whether the British Parliament can constitutionally interfere with our internal concerns; for, on that point, there can be but one opinion among the independent part of all the free Colonies.

In a communication to the Governor, the Assembly of the Bahamas declared that an "entire compliance" with the recommendations of the British Government was impracticable, and that no measures of amelioration which it might adopt should be considered as a pledge for others of a similar nature, "or as necessarily leading to any ulterior results, affecting, in the slightest degree, our existing right of property, in our present slaves or their descendants." [124] The Assembly did, however, pass resolutions for the revision and consolidation of the slave laws of the colony and the adoption of some of the recommendations of Lord Bathurst's despatch of July 9.[125]

In St. Kitts the Assembly, in reply to the Governor's speech at the opening of the session in November, 1823, professed itself ready to adopt all practicable measures to improve the condition of the slaves, but intimated that it would not be able to meet all the expectations of the British Parliament.[126]

In St. Vincent both branches of the Legislature early in September expressed "alarm," "astonishment" and "indignation" at the contents of Lord Bathurst's despatch. Property in slaves, they declared, was a "vested right" and a "sacred principle," and they said that the colonists must resist "in the most prompt and decided manner, and by every justifiable means, any attempt from whatever quarter, to infringe their undoubted privilege to legislate for themselves in all matters affecting their internal policy." [127]

In Antigua a bill "for the further amelioration of the slave population" was defeated in the Assembly by a vote of 16 to 6.[128]

But the British Government, though greatly disappointed with the barren results of its policy, was not yet prepared to resort to parliamentary intervention. In laying before the House of Commons papers explanatory of what had been done with regard to slave amelioration, Canning admitted that the desires of Parliament had been treated by many of the West India assemblies in a spirit that was anything but conciliatory.

> If, indeed [he said], there were anything like an equality of strength between the legislature of this mighty kingdom, and the colonial assemblies, as was the case in a struggle in which this country was heretofore engaged with her colonies, then might parliament, roused by insult as well as opposition to a feeling of exasperated dignity, denounce vengeance against Jamaica. But as I do not mean the thing, I will not use the language. . . . . The consciousness of superior strength disarms the spirit of resentment.

In words that Burke might well have used, he said:

> If there be any gentleman in the Jamaica house of assembly, who meditates the acquisition of fame and popularity by opposing what he pleases to call the encroachments of the mother country, and who is preparing himself for his contemplated career, by conning over the speeches of Washington and Franklin, we shall act most judiciously, by taking from him all lofty grounds of quarrel .... and leaving him to found his insurrection, if insurrection he will have, on an abstract admiration of the cart-whip.

Canning believed that if the West India "patriots" found that Parliament did not intend to coerce them, they would soon realize that the measures proposed to them were reasonable. In particular, he did not think that Jamaica would persevere long in its resistance,[129] but events were to show that the wish was father to the thought. He indicated that the Government would proceed from a policy of "recommendation and advice" to one of "authoritative admonition." If that should fail, commercial constraint might be put upon the colonies, in the form of regulations injurious to their commerce, the overriding power of Parliament being held in reserve for use if all other means should fail.[130] It is not surprising that the abolitionists had no more faith in "authoritative admonition" than they had had in "recommendation and advice," nor indeed that they failed to see any substantial difference between the two, and accused Canning of violating his "pledge" of the preceding year.[131] "Contumacy," said Wilberforce, was a mild term to apply to the "insulting and menacing resolves" which the colonial assemblies had adopted, and yet

the Government had taken no measures to enforce the resolutions of the House of Commons so far as the legislative colonies were concerned. The disposition in the West Indies to oppose reforms was increasing, not diminishing, he insisted, and it was futile to expect measures of amelioration from the local legislatures.[132]

It was easy enough for Wilberforce, Buxton and their friends to demand decisive action by Parliament, but those responsible for the conduct of the government knew that there were grave objections to such a course. They realized that it was one thing to pass laws for communities thousands of miles away and a very different thing to enforce them in the face of a bitterly hostile local public opinion; what had happened fifty years before in the case of the North American colonies was a bitter reminder of this fact. They knew, with Burke, that no administrative contrivance could overcome the effect of distance in weakening the power of government. If, as the abolitionists alleged, laws for the benefit of the slaves passed by the West India legislatures were not enforced, surely the colonial authorities could not be counted upon to execute acts of Parliament which they would look upon as unjust and unconstitutional.[133] It was true that in the circumstances of the case the West India colonists, surrounded by a vastly larger slave population and with their trade at the mercy of British sea power, would not dare, whatever their desire, to resort to actual rebellion.[134] But there was a very strong reason why the British Government should be most reluctant to ask Parliament to intervene in an open

and palpable manner in the interest of the slaves, and the West Indians and their friends took care that this should not be forgotten. Again and again they predicted that if the slaves should see the authority of the colonial legislatures overridden and the will of Parliament imposed upon their masters, they would rise in a desperate insurrection, and the British West Indies would suffer the fate of Hayti.[135] The British Government had not overlooked the possibility that its intentions would be misunderstood by the slaves, and accordingly, when the West India governors were first notified of the resolutions of the House of Commons they were authorized, in case excitement should arise among the negroes, to issue proclamations announcing that the contemplated measures of amelioration would be rendered abortive "in the event of any general misconduct, or acts of insubordination" on the part of the slaves, since it was upon their "temperate and industrious behavior, and upon their anxiety to avail themselves of all the means to improve their moral and religious condition," that the success of those measures depended.[136]

In the late summer of 1823 the slaves on some of the plantations in Demerara refused to work, and disturbances ensued. Martial law was proclaimed, and a number of so-called "insurgents" were executed. The slaves seem to have formed the impression that freedom had been granted to them by the King but was being withheld by their masters. Exaggerated reports and rumors of what had happened reached the other colonies and the mother country, and the affair was magnified into a desperate slave insurrection. The

abolitionists put the blame upon the planters, saying that their angry and intemperate abuse of the Government had been overheard and misunderstood by the slaves, while the West Indians and their friends insisted that the responsibility rested with the abolitionists and the Government, and pointed to Demerara as an awful warning against British interference in the relations between masters and slaves in the West Indies. The fact that this latter view found influential support in England was, without doubt, one of the reasons why the Government decided to content itself for the time being with a course no more drastic than that of "authoritative admonition." [137]

The plan announced by Canning in the House of Commons on March 16, 1824, was to introduce at once, by order in council, a number of reforms in Trinidad and extend them subsequently to the other crown colonies in the West Indies, in the hope that they would serve as a model for the legislative colonies to copy.[138] The order in council for Trinidad, issued on March 10, provided, among other things, for the appointment of an officer to be known as Protector and Guardian of Slaves, abolished the flogging of female slaves, regulated the punishment of males, prohibited the use of the whip in the field, and made provision for the encouragement of marriage among slaves, for the admission of their testimony in court, and for their compulsory manumission under certain conditions.[139] The planters of Trinidad expressed the strongest opposition to this law, and the Council asked the Governor to stay its promulgation until the British Government could be informed of its

injurious tendencies.[140] Copies of it were duly transmitted to the legislative colonies, with a statement to the effect that the Government would be greatly disappointed if the reforms for which it provided were not adopted by the legislatures.

The Jamaica Assembly, in answer to a message from the Governor, declared "the present season of alarm and agitation, when the negro mind is peculiarly liable to receive false impressions, unfavourable for the adoption of any measures interfering with long established institutions." By a vote of 36 to 1 it rejected a bill to admit slave evidence in court. In an Address and Petition to the King, adopted on December 16, 1824, it appealed to him for protection from the "fatal consequences" that would result if the House of Commons persisted in discussing the question of reform, attributed "a spirit of revolt" among the slaves to a belief on their part that the King had freed them, and asked for compensation from Parliament for losses that had been sustained. In informing the Colonial Office of the results of the session the Governor was able to report the passage of two acts providing for minor reforms, but he had to admit that they fell far short of expectations. That more had not been done he attributed to the general belief in the colony that the slaves were in a dangerous state of excitement.[141] In comment upon the outcome of the session Lord Bathurst said: "Jamaica has always been considered as the colony which was most likely to take the lead [in reform] . . . . and it is a great mortification . . . . that there is not any one West India Colony which either has not done

more than Jamaica, or has not made the example of Jamaica their apology for doing so little." [142]

Nor did the Jamaica Assembly show a more compliant spirit during the session of 1825. No measure of substantial reform was passed, and the Governor reluctantly came to the conclusion that it would be impossible to induce the existing Assembly to do anything toward meeting the desires of the British Government. In proroguing the Legislature at the end of the session he said: "It does not become me to anticipate what the result may be of the great disappointment His Majesty's Government will experience, when they learn that the re-iterated representations which have been made to you . . . . have totally failed." [143]

It is unnecessary to follow in detail the proceedings of the other West India legislatures in 1824-5 in response to the "authoritative admonition" of the British Government. In every case they fell below the hopes of the Government, and in some instances they amounted to a blunt refusal to take any effective action at all. In March, 1826, Lord Bathurst told the House of Lords that, with the exception of some legislation in Grenada, Dominica and St. Vincent, "very little had anywhere been done, towards effecting the objects which his majesty's government had in view." [144]

The Government, nevertheless, determined to persevere in its course, and in May, 1826, the Colonial Secretary transmitted to the West Indies a series of documents embodying the provisions of the Trinidad order in council of March, 1824, with such modifications as had been made. There were eight of them, and they were in the form of heads of bills

to be introduced into the colonial assemblies.[145] In Jamaica the Governor submitted these measures to a new Assembly, which, it was hoped, would prove more compliant than its predecessors, with the reminder that the British nation had "loudly and unequivocally called for a melioration of the condition of the slaves." [146] The Assembly replied that such measures, if adopted in Jamaica, would not only endanger life and property but "would ultimately terminate in the ruin and destruction of the most valuable colony his majesty possesses." [147]

Though the eight bills, as a whole, were not passed by any of the West India assemblies, several of their provisions were incorporated in new slave codes. In despatches sent out to the Governors in September, 1828, the Legislatures of the Bahamas, Barbados, Grenada, St. Kitts and Tobago were praised for their laudable conduct in adopting a number of the reforms that had been proposed to them. The Legislatures of Dominica, Antigua, Montserrat and St. Vincent, on the other hand, were censured for their "extreme backwardness" in the work of amelioration.[148]

In Jamaica a new slave code was passed in December, 1826, which, in the Governor's opinion, materially improved the condition of the slaves in important respects. The Colonial Office was satisfied with many of its provisions, but some of them were found objectionable, and the act was disallowed. Huskisson, who had succeeded Lord Bathurst as Colonial Secretary, explained why this action had been taken and expressed hope that a satisfactory act would be passed by the colonial legislature. The Assembly, in

response, declared that the disallowance of the act must shake the confidence of the colony in the wisdom and justice of the British Government and said:

> They cannot pass a new bill, containing the amendments suggested in Mr. Huskisson's despatch, without sacrificing their independence and endangering the safety of the island. And as the Lieutenant Governor is forbidden to sanction such a bill as the House can consent to pass, the slave population must again be governed by the Act of 1816. When it shall please His Majesty to withdraw the instruction to the Governor, which limits the legislative power of the Assembly, the House will once more take the Slave Code into their serious consideration.[149]

A subsequent Jamaica slave act was also disallowed, but finally, in February, 1831, one was passed that met the approval of the Home Government.[150]

Not until after the Whig Ministry of Earl Grey had come to power in England was the Government ready to admit that the policy of authoritative admonition had foundered on the rock of West Indian intransigence. This confession was finally made in a circular despatch sent out by the Colonial Secretary, Lord Goderich, to the West India governors in December, 1831.[151] "The course of authoritative admonition," he said, "has been pursued for eight years and has been .... utterly unsuccessful." It had been decided to abandon this course, he announced, because it was felt that the language of admonition had been exhausted, and that further efforts along the same line would not increase the respect of the colonial legislatures for the authority of the Crown. He then explained the new policy

which had been determined upon. The West India sugar interests were in severe economic distress, and for their benefit the Government had decided to propose to Parliament a substantial measure of relief, in the form of a reduction of duties on West India produce imported into the United Kingdom. This would take effect as a matter of course in the case of the produce of the crown colonies, and the same advantage would be extended to the produce of any legislative colony on condition that its legislature would put into effect, without alteration or qualification, an order in council which had recently been issued for improving the condition of the slaves in the crown colonies of Trinidad, British Guiana, St. Lucia, the Cape of Good Hope and Mauritius. This law, in substance a long and detailed code of reforms to take the place of earlier measures of amelioration which were repealed, provided for the appointment in each of those colonies of a Protector and Assistant Protector of Slaves and defined their duties; regulated the hours of slave labor; abolished the flogging of females and required that all punishments inflicted upon slaves be recorded; authorized courts to adjudge an owner's right to a slave forfeited for cruelty; decreed that slaves might acquire and bequeath property, marry, and purchase their freedom even without their master's consent; required that slave evidence be received in court; gave slaves the right to worship in any Christian church or chapel not more than six miles distant from their place of residence; and required masters, under penalty, to provide their slaves with suitable food, clothing and medical service.[152]

But Whig promises of reward were no more successful than Tory admonitions had been. Not a single legislature accepted the offer on the terms stipulated.[153] The Assembly of Jamaica, in March, 1832, replied that any further measures of amelioration must emanate from itself.[154] The Assembly of Antigua pronounced the proposed measures "ruinous in their effects, being compatible neither with the safety of the Colony, nor with a fair and equitable consideration of the rights of property."[155]

In Barbados the Assembly, in February, 1832, just before its dissolution, declared that it could not, "consistently with the welfare of the Colony and in conformity with the unconditional course the Legislature were desired by His Majesty's Government to pursue," do otherwise than decline to enact the proposed legislation.[156] In the following June a new Assembly expressed its opinion of the order in council and Lord Goderich's despatch in the following words:

It would be an unwarrantable trespass on your Excellency's attention were we in this place to enter into a detail of the *Minutiae* of our objections to that Document, the Order in Council, which we consider the most despotic and arbitrary Act that ever was promulgated by any authority in Great Britain, and the Despatch of the Colonial Secretary accompanying the Order the most dictatorial. The Order is unfair, unconstitutional and unjust. It is unfair, because whilst the Order lays heavy and oppressive restrictions and duties on the master, it neither makes any provision to give him redress against injuries, nor does it provide for the contumacious conduct of the slave towards his owner. It is unconstitutional because it gives

a power to the Protector which the Sovereign himself does not possess, that of entering upon the property of other persons whenever he may think proper. It is unjust, because the time allotted for labour is not sufficient for the cultivation of West India property, and is much less than the daily number of hours allowed by Act of Parliament for the labouring children in Great Britain. For these and other reasons we cannot, in justice to our constituents, in any manner adopt or countenance such illegal and oppressive measures.[157]

A joint committee of the Council and Assembly of St. Kitts declined to recommend that the Legislature should incorporate the order in council without qualification into the law of the colony. Representatives, it said, were "bound to exercise a discretion to the best of their judgment for the public welfare," but the Colonial Secretary required "an unqualified surrender of that judgment to his discretion." In transmitting its report to the Colonial Office the Governor said: "It is unnecessary for me to offer any observations on this subject, the result being that the Legislature has not acceded to the proposals made by His Majesty's Government." [158]

A similar joint committee appointed by the Legislature of Dominica declared that, "in the only alternative allowed by His Majesty's Government," the welfare of the colony required that the order in council should be rejected.[159]

In Grenada it was declared in a joint resolution of the Legislature:

That without entering into an examination of the particular provisions of the Order in Council . . . . the Council

and Assembly feel it a paramount duty . . . . to declare, that to give the same the effect of a Law, as required, would be incompatible altogether with their liberties as British subjects, as well as with their chartered rights as Colonists, and in direct violation of the National faith under which they have acquired and hitherto held their properties. . . . . Whatever, therefore, may be the consequences, the Council and Assembly are of opinion, that they cannot entertain the idea of giving the Order in Council the effect of a Law of the Colony, as required by the Despatch of the Secretary of State for the Colonies.[160]

The Assembly of Tobago resolved that:

The direction of His Majesty's Government to pass a law in the very words of the Order in Council, without allowing the Legislature to alter its language, or to adapt it to local circumstances, is a species of dictation before unheard of, and appears to be a first step towards depriving the Colony of its Charter and Constitution, and the Legislature of the deliberative power of enacting laws for the internal government of the Island.

The House will always be ready and willing, as occasion may require, to enact any further measure that may be necessary for the improvement of the Slave Population; but they must protest in the most solemn manner against the endeavour to enforce the Order in Council; and without factiously setting themselves up in opposition to the wishes of His Majesty's Government, this House is determined to oppose by every legal and constitutional means the attempt thus made to legislate for the Colony, and therefore will take no further notice of the same.[161]

A circular despatch sent to the West India governors by the Colonial Secretary on May 12, 1832, marks the end of the nine-years' campaign which the Government had been conducting to induce the colonial legislatures to cooperate

in the work of Slave Amelioration.[162] In this document the announcement was made that further proceedings had been suspended pending the report of a committee of the House of Lords, appointed at the request of merchants and others interested in West India property to investigate the state of society in the islands and the laws regulating the relations between owners and slaves. A later despatch, dated June 9, 1832, conveyed more portentous information.[163] A committee of the House of Commons had been appointed on May 24, not at the instance of friends of the planters but in consequence of numerous petitions for the abolition of slavery. Buxton was its chairman, and it was directed "to consider and report upon the measures which it may be expedient to adopt for the purpose of effecting the extinction of slavery throughout the British Dominions, at the earliest period compatible with the safety of all classes in the Colonies, and in conformity with the Resolutions of this House on the 15th day of May, 1823." [164] It was found to be impossible to conduct an exhaustive inquiry into all phases of the question before the end of the parliamentary session, but a large amount of testimony was taken, and the committee reported in August that the evidence, though incomplete, disclosed a state of affairs "demanding the earliest and most serious attention of the Legislature." [165] Without instituting any further inquiry the Government proceeded to formulate a plan for the immediate abolition of slavery, which was embodied in a series of resolutions presented to the House of Commons on May 14, 1833. After prolonged debate these resolutions, with some amendments,

were adopted by the House, and, having received the approval of the Lords, they served as the basis of the Abolition Act, which became law in August.

* * *

By this great measure it was decreed that slavery should come to an end throughout the British colonies on August 1, 1834. All slaves of the age of six years or upwards on that day were to become apprenticed laborers, and during the period of their apprenticeship, which was not to last in any case beyond August 1, 1840, their former owners were to be entitled to their services. Apprentices were to be divided into "predial" and "non-predial," the former comprising those who had been employed as slaves on the land, the latter including all other former slaves. The act made provision for the appointment and payment of special justices to execute its provisions and supervise the apprenticed laborers. It was recognized that supplementary legislation would be necessary to give effect to the act, and it was accordingly provided that colonial legislatures might make laws for this purpose. It was expressly stated to be desirable that such provisions of the act as related to the "internal concerns" of the colonies should be reenacted by the colonial legislatures. Slave-owners were to receive compensation, not to exceed £20,000,000 in the aggregate, but no person was to receive any compensation for the emancipation of any slave in any colony until an order in council had been issued declaring that adequate provision had been made by law in such colony for giving effect to the act.[166]

The West Indians and their friends professed to find in

the changes which the Reform Bill of 1832 made in the English representative system an additional reason for objecting to parliamentary interference in the internal affairs of the colonies. Before 1832 there had always been a considerable number of spokesmen for the West Indies in the House of Commons, since West India agents, merchants and planters, resident in England, were often returned by pocket boroughs, and the islands had thus enjoyed what was spoken of as "indirect representation" in Parliament.[167] While the Reform Bill was before the House of Commons, Joseph Hume alluded to the injurious effect which the abolition of the pocket boroughs would have on colonial interests. He said:

> It was true some Gentlemen connected with the colonies found their way into the House. But one of the greatest and most striking objections to the Reform Bill had been, that, when it came into operation, the same means would not exist for enabling Gentlemen connected with the colonies to obtain seats; and a large portion, if not the whole, of the colonies, would be left without any legitimate mode of conveying their wishes or wants to the Imperial Legislature.[168]

Accordingly, he moved that provision should be made in the bill to give the colonies direct representation in Parliament, and proposed that nineteen seats in the reformed House of Commons should be allotted to them, and that five of these should be assigned to the West Indies. Mr. Burge, a member of the House who was also agent for Jamaica, spoke in favor of the principle of Hume's motion, though he made it clear that in his opinion internal legislation for the colonies should in any event be left to the colonial

legislatures. Hume's interesting proposal for imperial consolidation found little support, however, and was rejected.[169]

The opinion that the Reform Bill deprived the colonies of "indirect representation" in Parliament figured in a controversy between the Governor and Assembly of Jamaica during the autumn of 1832. In an address to the Governor, Lord Mulgrave, the Assembly said that since it had not admitted the right of Parliament to interfere in the internal affairs of Jamaica even when the West Indies were indirectly represented in the House of Commons, still less could it concede its right to do so now that it was to be based upon the principle "that actual representation should be the foundation of legislation." Lord Mulgrave, in answer, denied that the Reform Bill had made any change in Parliament's relation to the West Indies. It was only as representatives elected by the people of the United Kingdom, he said, that persons connected with Jamaica had ever been able to sit in the House of Commons. Parliament's "transcendent power" over the whole Empire, he insisted, could be limited only by such restrictions as it might see fit to impose upon itself. The Assembly replied by pronouncing this doctrine of parliamentary sovereignty subversive of the "acknowledged rights" of the inhabitants of Jamaica, who, though recognizing "the supremacy of a common sovereign over the whole empire," could never admit "such supremacy in one portion of his majesty's subjects residing in the parent state over another portion of their fellow subjects resident in Jamaica."[170]

In the debates in Parliament on the Government's aboli-

tion resolutions it was agreed on all sides that the time had come when slavery must be abolished. But spokesmen for the West Indies urged that emancipation should be effected by the colonial legislatures, and some of them repeated the arguments against parliamentary interference in the internal affairs of the colonies that had been advanced in opposition to the Registry Bill.[171] Sir Richard Vyvyan, one of the West India champions, cited with approval the proceedings of the Jamaica Assembly to show that the Reform Bill had deprived the colonies of indirect representation in Parliament, and that therefore there could be no justification whatever for parliamentary interference with slavery. But the loss-of-indirect-representation argument, as the Governor of Jamaica had shown, had no legal validity, and little could be said for it on the score of justice to the colonies when Vyvyan himself admitted that a number of persons connected with the West Indies had been elected to the reformed House of Commons through ministerial influence.[172] Parliament's relation to the colonies, in short, was not affected by the Reform Bill, nor was its right to regulate their internal affairs disputed by any considerable number of its own members. It was, however, the general opinion, expressed by representatives both of the Government and of the Opposition, that the successful accomplishment of emancipation would require the cooperation of the colonial legislatures;[173] and it was primarily in order to secure this cooperation that the Government proposed to compensate the slave-owners.[174]

Several of the West India assemblies protested against

the Abolition Act,[175] but they all had to face the fact that slavery was doomed; and if the slave-owners were to receive such compensation as Parliament offered, it was necessary for the colonial legislatures to pass auxiliary laws. This they proceeded to do, Jamaica taking the lead with an Abolition Act passed in December, 1833.[176] In an address to the Governor the Assembly declared that this action had not been taken willingly, but in order to avert the greater danger of opposing the imperial act.[177] The right of Parliament to legislate in the internal affairs of the colony was not conceded, and according to the wording of the Jamaica law, emancipation and the establishment of the apprenticeship system were to take affect in the island by virtue of its own provisions. Similar abolition acts were passed in the other West India colonies.

In order to explain and amend the Jamaica act the Legislature passed what was called an act in aid, which expired by its own provision on December 31, 1835. Prior to this date it passed another act in aid, but this was disallowed by the Home Government on the ground that it contained provisions repugnant to those of the imperial act.[178] Some of the provisions of the expired Jamaica law were regarded by the Colonial Office as requisite to give full effect to the imperial act, and under the circumstances it was deemed necessary to have recourse to Parliament. A statute was accordingly passed during the session of 1836, reviving the provisions of the Jamaica law and providing that they should remain in operation until August 1, 1840, the date for the termination of the apprenticeship system, unless

before then the Legislature of Jamaica should have passed an act to the same effect, in which case the imperial statute should forthwith cease to be operative.[179] This was a clear case of parliamentary legislation in the internal affairs of Jamaica, and the response of the Assembly showed that cherished constitutional claims had by no means been abandoned. In a Memorial to the King,[180] adopted on June 14, 1836, the Assembly said:

> We complain of the unconstitutional outrage committed upon our rights by the recent introduction of a Bill into the House of Commons to revive an Act of our Legislature, intituled, "An Act in Aid of the Abolition Act," which had expired. We humbly submit that no proceedings of ours have justified this invasion.
>
> We assert "that all laws for internal regulations should be propounded and framed in our own House"; this principle we have, from the earliest periods of our history, "maintained as one of our inherent rights as British subjects, neither altered or abridged by our situation of colonists. . . . ." This House did, in the year 1774, address an humble petition and memorial to Your Majesty's Royal Father, declaring "that your petitioners and the colonists are not, nor ought to be, bound by any other laws than such as they have themselves assented to, and not disallowed by Your Majesty," in which sentiment this House fully coincides.

In the course of examination before the House of Commons the agent for Jamaica was asked whether the Assembly denied the right of Parliament to pass the act in question. For answer he read the first three sentences in the extract from the Memorial given above.[181]

Public opinion in Jamaica was aroused to a high pitch of indignation by two Acts of Parliament pased in the year 1838, and the response of the Assembly to these laws marks the climax of the long opposition in the colony to the exercise of parliamentary authority in its internal affairs.

In 1836 a select committee of the House of Commons was appointed to inquire into the working of the apprenticeship system. Limiting detailed investigation to Jamaica, the committee reached the conclusion that the new system, on the whole, was working fairly well, but found that in a number of particulars the laws of Jamaica, as affecting the condition of the negro population, were open to objection.[182] Stories of cruelty inflicted on apprentices reached England and aroused public sentiment in their behalf; and petitions for the immediate abolition of the apprenticeship system poured in on both Houses of Parliament at the opening of the session of 1838.[183] On the ground that further provisions were necessary for the protection of the former slaves a bill was introduced into Parliament to remedy the defects of the colonial laws, especially those of Jamaica, to which the committee had called attention. In the debate on the second reading in the House of Lords the Colonial Secretary, Lord Glenelg, said that the colonial legislatures had not heeded the recommendations of the committee, and that the Government was compelled to ask "whether it was not in the wisdom — it was certainly in the competency — of Parliament to interpose, in order to supply such defects as time

and experience had shown to result from the working of the system established in 1833." [184] The Marquess of Sligo, who had recently been Governor of Jamaica, declared that everyone who had given attention to the matter was convinced that the time had come when it was necessary to invoke the paramount authority of Parliament.[185] The Abolition Act Amendment Act, as it was called, became law in April, 1838.[186] It was a palpable and avowed case of parliamentary intervention in the internal affairs of the colonies. In June the Assembly of Jamaica voted a Protest in which constitutional claims were reiterated in language that could only be regarded in England as intemperate and insolent; and the Assembly actually threatened to abdicate if Parliament persisted in legislating for the colony. The following are some extracts from this remarkable document:[187]

Jamaica is dependent on the Crown of England, and she admits the right of the English Parliament to regulate the commerce of the empire, but she rejects with indignation, its claim to make other laws to govern her. . . . .

It is unreasonable and unnatural that one nation should assume to pass laws to bind another nation, of whose customs, wants, constitution, and physical advantages and disadvantages, she is, and must be profoundly ignorant; and whose distance opposes an insurmountable barrier to the attainment of local information, or to the application of remedies for any sudden emergency. . . . .

We believe that a people will sometimes passively submit to injustice and encroachment, committed by a Sovereign sprung from a race which has ruled over them for ages. . . . . But no obedience is due to fellow-subjects; their bad government is intolerably odious and heavy, and their best

attempts at legislation are received with suspicion and dislike. . . . .

It is not necessary to look back upon the steps by which the British Parliament has usurped the legitimate powers of the Assembly of Jamaica: the monstrous pretexts which have accompanied her usurpation, and the falsehoods and slanders which have been advanced to justify it, it would be useless to complain of or to contravert. When lawgivers consent to sit in judgment on an Assembly, in no respect their inferior, except in extent and magnitude of power; when they condemn, and presume to punish, upon charges kept secret from the accused, they cannot be expected to listen to a defence which would convict them, either of imbecility and cowardice, if they were urged to the injustice by popular clamour, or of fraud and malice, and a thirst for omnipotent authority, if the injustice was the result of deliberation and design.

This House does not dread a comparison with the Commons of England in the success of their legislation. Our laws have not been defied, as by the Irish opponents of tithes. . . . . Our courts are never occupied with the obscenities which disgrace England. . . . . We have no Corn Laws to add to the wealth of the rich, nor Poor Laws to imprison, under pretence of maintaining, the poor. . . . .

While we protest against the usurping power of the British Parliament, and deny their right to pass laws for our government, we cannot overlook the character of the Parliament which affects to regulate and constrain our morals and humanity. Of the three branches, the greatest share of power rests in the Commons. That body has been accused . . . . by a leading member, of the high crime of perjury. The accuser has not been punished, nor the charge refuted. . . . . The House of Commons has also been charged with corruption in the progress through the House of Private Bills.

We, however, assume that the Commons House of Great Britain is pure, and that to our degradation will not be

added the ignominy of being governed by unworthy fellow subjects.

We will also acknowledge that they can seize by force on the powers which they do not possess in law or reason; but there cannot be two legislatures in one state. If the British Parliament is to make laws for Jamaica, it must exercise that prerogative without a partner. The freeholders of Jamaica will not send representatives to a mock assembly, nor will representatives be found to accept a service so docked and crippled. The popular branch of the legislature will cease to exist, and if any taxes are demanded, they must be levied at the point of the sword. . . . .

We, therefore, the members of the Assembly, do . . . . protest against an Act passed by the British Parliament, intituled, "An Act to amend the Act for the Abolition of Slavery in the British Colonies." . . . . We declare the said Act . . . . to be illegal, unconstitutional, and an usurpation of our legislative rights, and of the rights of our constituents . . . . subversive of English law, threatening to the peace of this and our sister colonies, and dangerous to the integrity of the empire.

During the parliamentary session of 1837 a committee of the House of Commons reported that the state of the prisons in the West Indies, a subject closely related to the apprenticeship system, called for immediate and searching investigation,[188] and a special commissioner was appointed to conduct such an inquiry. His report disclosed the existence of revolting conditions in the jails and houses of correction, notably in Jamaica,[189] and in 1838 Parliament passed a bill to provide for their inspection and regulation.[190] It authorized the Queen in Council, or the governor and council of a colony, without the concurrence of the assembly, to make rules for the administration of the prisons, gave powers of

visitation and inspection to the governors or persons acting under authority from them, and forbade the imprisonment of any person in any prison certified by the governor to be unfit. In a circular despatch to the governors the Colonial Secretary explained that it had seemed essential to establish a uniform system of prison inspection and superintendence throughout the islands, and that the intervention of Parliament was necessary to accomplish this object.[191] While the bill was pending in Parliament the agent for Jamaica protested against it as being not only an unconstitutional interference in the internal affairs of the colony but a violation of the spirit of the Renunciation Act of 1778, because, so he said, it indirectly compelled the colonial Legislature to raise revenue for making improvements in such prisons as the Governor might certify to be unfit, since otherwise convicts could not be imprisoned in them.[192]

The exasperation of the Jamaica planters found expression in the colonial press. *The Royal Gazette and Jamaica Times* called upon the Assembly to abstain from all legislative business until its privileges were acknowledged and its powers known.[193] It would be better, in the opinion of this journal, for Jamaica to be governed as a crown colony, without a representative assembly, than to remain as it was. On October 30, 1838, the Assembly met for the opening of its autumn session in an angry and defiant mood, and on the following day, by large majorities, it adopted resolutions which went to the length of declaring the Prisons Act void and of no effect in the colony, and announcing its intention to desist from the exercise of its

functions until the British Government should make known whether the inhabitants of Jamaica were to be treated as British subjects or as a conquered colony. This is the text of these extraordinary resolutions:[194]

Resolved, 1st. That the act of the British Parliament, intituled, "An Act for the better Government of Prisons in the West Indies," is a violation of our inherent rights as British subjects, as recognized by the constitution of this island, and by the Act of Parliament, 18 Geo. III, c. 12; that the same has not, and ought not to have, the force of law in this island, and that the authorities will not be justified in acting on it.

Resolved, 2nd. That the violation of our rights by the Parliament of Great Britain, in which we are not represented, is the less excusable, inasmuch as the House was prepared to enter into the consideration of prison discipline as soon as the report of her Majesty's commissioner was officially before them.

Resolved, 3rd. That the House have witnessed with the deepest regret the unmerited censures passed upon the inhabitants of this island, the extent to which the public mind in Great Britain has been poisoned against them, the absence of all confidence in the Legislature, the reckless manner in which the laws passed by it have been disallowed, and the system of legislation for the colonies which has been determined on, whereby the power of the House has been fettered, and that body has ceased to exist for any purpose useful to the people whom they represent.

Resolved, 4th. Therefore, that, in the opinion of this House, they will best consult their own honour, the right of their constituents, and the peace and well-being of the colony, by abstaining from the exercise of any legislative function, excepting such as may be necessary to preserve inviolate the faith of the island with the public creditor, until her most gracious Majesty's pleasure shall be made

known, whether her subjects of Jamaica, now happily all in a state of freedom, are henceforth to be treated as subjects with the power of making laws, as hitherto, for their own government, or whether they are to be treated as a conquered colony and governed by parliamentary legislation, orders in council; or, as in the case of the late amended Abolition Act, by investing the Governor of the island with the arbitrary power of issuing proclamations having the force of law over the lives and properties of the people.[195]

A few days later the Governor dissolved the Legislature, but the Assembly chosen in the election that followed was no more compliant, and on December 19, by a vote of 33 to 5, it resolved to adhere to the resolutions of its predecessor.[196] The Governor, Sir Lionel Smith, informed the Colonial Secretary that the colony was placed in great confusion by reason of the lapse of annual laws and added: "Your Lordship will be fully satisfied, from this last appeal to the electoral body, that no House of Assembly can now be found that will acknowledge the authority of The Queen, Lords and Commons, to enact laws for Jamaica, or that will be likely to pass just and prudent laws for that large portion of the negro population lately brought into freedom."[197]

Under these circumstances a bill was introduced into Parliament that figures in English political history as the cause of the resignation of Lord Melbourne's ministry. It provided for suspending the Assembly of Jamaica for a term of years and empowering the Governor and Council to legislate for the colony.[198] When the majority for the bill in the House of Commons fell to five in a vote of 294 to 289

the Whig ministers took it as a virtual defeat and tendered their resignations.[199] The Queen sent for Sir Robert Peel, but he was unable to form a ministry on account of the famous "Bedchamber Crisis." The Whigs thereupon returned to office and presently introduced a second Jamaica Bill, less drastic than the first, which, after amendment by the House of Lords, became law in July, 1839.[200] This did not interfere with the Assembly of Jamaica but empowered the Governor and Council to reenact any law of the colony that had expired since November 2, 1838, and had not, within a certain length of time, been revived with the concurrence of the Assembly.

At this juncture Sir Charles Metcalfe was sent out to the colony as Governor, with instructions to adopt a conciliatory tone in his dealings with the Legislature, to give assurances that Parliament had never desired to interfere unnecessarily with its functions, and to express the hope and expectation that the Assembly would pursue such a course that the extraordinary legislative power conferred upon the Governor and Council need not be brought into operation.[201] The new Governor's address at the opening of the legislative session in October, 1839, was in conformity with his instructions.[202] "I cannot promise," he said, "that the Imperial Parliament will not exercise its paramount authority whenever it sees fit to do so; but I can assure you that it has no desire to interfere without necessity, and is anxious to avoid interference, and to limit its exercise when unavoidable, within the narrowest bounds compatible with the due protection of all classes of the community of this

Island. It is in your power, I trust, to prevent any emergency that would require or justify such interposition.'' On October 23 the Assembly adopted resolutions which, though not conciliatory in tone nor conceding that its previous resolves had been unwarranted, announced its intention of resuming its functions.[203] Metcalfe was able to inform the Colonial Office that the business of the session had been conducted ''with great zeal and public spirit, unremitting application, and uninterrupted harmony.''[204] He had handled a difficult and delicate situation with remarkable tact and wisdom.

* * *

It was not apparent to most contemporaries that the old political institutions of the West Indies were not adapted to the new social conditions resulting from the emancipation of the slaves, yet there were some who saw the problem of West India government in its larger bearings. The assemblies, representative of small planter aristocracies, were unable to take an objective view of the needs of the newly freed negro population, which was in an overwhelming majority in all the islands. In Jamaica an assembly composed of 45 members, chosen by 1796 voters,[205] was called upon to legislate for a third of a million black British subjects. What chance was there that ''representative institutions'' could be made to work effectively and equitably under such conditions?

In January, 1839, Henry Taylor, one of the permanent officials of the Colonial Office, drew up for submission to the Cabinet a remarkable memorandum on the course to

be taken with respect to the West India assemblies, especially the Assembly of Jamaica.[206] It was intended to show that there was no basis in the West Indies for a really representative system of government, and that any attempt at such could only result in oligarchy. It declared that the abolition of the Jamaica Assembly was "urgently demanded" by "considerations of general and prospective policy," and that the existing crisis, in which that body had put itself hopelessly in the wrong, was peculiarly favorable for the accomplishment of this object. The document concluded with the proposal that "the Government should apply to Parliament for the abolition of the Assemblies and the substitution of Legislatures in the chartered colonies based on the model of the Legislatures already existing in the Crown Colonies, in which the power of the Crown was paramout." In his *Autobiography*, published many years later, Taylor said that the Prime Minister, Lord Melbourne, approved of the memorandum, and that it was discussed at three cabinet meetings, but that Lord Glenelg, the Colonial Secretary, gave it only lukewarm support, "and in the end its adversaries prevailed to the extent of reducing it to a measure for suspending the Jamaica Assembly . . . . instead of abolishing all the West Indian Assemblies and substituting Crown Colony Councils." [207]

In a speech in the House of Commons on the bill to suspend the Jamaica Assembly (May 3, 1839) Charles Buller voiced opinions as to the need for thoroughgoing political reconstruction in the West Indies strikingly similar to those

set forth in the Taylor Memorandum, of which, in all probability, he had knowledge. Parliament, according to Buller, ought not to interfere in the internal affairs of the colonies so long as it permitted local legislatures, charged with the function of internal legislation, to exist; and on the question of the West India prisons he thought that Parliament had been in the wrong, since the management of prisons was a matter of internal regulation, which the constitution of the colony placed under the exclusive jurisdiction of its own legislature. But Parliament, he declared, had the right to abolish the existing constitution of Jamaica, and he urged that under the circumstances it ought to do so. A great social revolution had taken place, and new laws must be made for a new people; but for this task the Assembly of Jamaica was utterly unfit. It was "one of the narrowest and most oppressive oligarchies that ever mocked the form of free government." Buller is known to history principally as a leading member of the group of colonial reformers, a colleague of Edward Gibbon Wakefield and Lord Durham; his most important public service was his championship in Parliament of the cause of responsible government for colonies in which local conditions made it practicable. But for a colony like Jamaica he believed that an autocratic form of government was the best that could be established. "Settle the question as you please," he said, "the constitution of Jamaica is still unsuited to the present state of society in the island; and its existence is an intolerable evil." [208]

The Assembly which had defied the Imperial Parliament

so often and so boldly survived until 1866, when it finally consented to its own abolition, and crown colony government was established in Jamaica. The argument of the Taylor Memorandum was sound; the old West India assemblies were not qualified to deal with the new social régime, and by 1875 they had come to an end in all the islands except Barbados and the Bahamas.

Chapter V

THE PRESENT POSITION

The British Empire of today consists of three aggregations of peoples. The first, and politically the most advanced, is the British Commonwealth of Nations, the scattered group of self-governing communities made up of Great Britain and the British Dominions — Canada, Australia, New Zealand, South Africa, the Irish Free State and Newfoundland. The second is the Indian Empire, comprising British India and some 700 dependent native states. The third is a far-flung collection of dependencies, the Colonial Empire proper, including crown colonies, protectorates and mandated territories, most of which are subject to the British Colonial Office, though a few are administered by Dominion governments. In relation to the last two of these three constituent parts of the British Empire the Parliament at Westminster is still, in fact as well as in form, a sovereign legislature. Over them its authority remains unimpaired and can be exercised at will, though in practice local legislatures are permitted to deal with matters of local concern, and with respect to British India it is the declared policy of Parliament, as stated in the Government of India Act (1919), the basis of the present Indian constitution, to provide for "the gradual development of self-governing institutions, with a view to the

progressive realization of responsible government.'' So far, however, as the Dominions are concerned, the British Parliament has ceased to be an Imperial Parliament in any real sense of that term. The components of the British Commonwealth were declared by the Imperial Conference of 1926 to be ''autonomous Communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations.'' [1] Equality of status and free association, thus affirmed as basic principles in the constitutional relations between Great Britain and the Dominions, have many implications, — for example, the right of any Dominion to make such treaties as it pleases, provided they do not impose obligations on other parts of the Empire. Our attention will be focused on one of these implications, which is this — that no member of the Commonwealth is subject to the legislative authority of any other member. On this point, indeed, the Imperial Conference was explicit, for it went on record as declaring that ''the consitutional practice is that legislation by the Parliament at Westminster applying to a Dominion would only be passed with the consent of the Dominion concerned.'' [2] This concluding chapter is a fragmentary sketch, intended to suggest how and in what sense the British Parliament has lost its authority over the self-governing Dominions.

* * *

During the course of the controversy that preceded the

American Revolution many of the colonists and some Englishmen contended that the British Empire was an association of equals. The disruption of the Empire was, in fact, a result of conflicting opinion as to its character and proper organization. A quarter of a century after the Declaration of Independence Madison wrote:

> The fundamental principle of the Revolution was, that the Colonies were coordinate members with each other and with Great Britain, of an empire united by a common executive sovereign, but not united by any common legislative sovereign. The legislative power was maintained to be as complete in each American Parliament, as in the British Parliament. And the royal prerogative was in force in each Colony by virtue of its acknowledging the King for its executive magistrate, as it was in Great Britain by virtue of a like acknowledgment there. A denial of these principles by Great Britain, and the assertion of them by America, produced the Revolution.[3]

Commenting upon this statement of Madison's, Dr. Randolph Greenfield Adams, in his *Political Ideas of the American Revolution*, says: "This is, in short, the whole essence of the theory of 'imperial partnership,' of 'the commonwealth of nations,' or whatever other term one chooses to employ to express the relationship actually existing between Great Britain and the dominions at the beginning of the twentieth century."[4] There is no denying the resemblance between the imperial ideas of the American patriots of 1774 and those expressed by the Imperial Conference of 1926, and the temptation is strong, especially for an American, to hail James Wilson and Thomas Jefferson and John Adams as "fathers" of the present British

Commonwealth. But the temptation must be resisted. The Commonwealth is a product of conditions wholly unforeseen by the American Revolutionists, and I know of no evidence to indicate that its evolution was affected by their thought.

If political theory has in any sort conditioned its development, it is the philosophy of expediency in statecraft exemplified in the speeches and writings of Burke. The British Commonwealth has not come into being through a process of political construction according to specifications logically deduced from a postulated equality of status. On the contrary, equality of status is an inductive generalization purporting to be descriptive of actual constitutional relations now existing between members of the Commonwealth.[5] Burke was not gifted with superhuman prescience. Living at a time when colonies were still colonies, he did not envisage the British Commonwealth of today. But he knew that "nothing in progression can rest on its original plan," and that government "ought to conform to the exigencies of the time, and the temper and character of the people with whom it is concerned."[6] He had an invincible distrust of the spirit of legalism in politics; he knew that what is lawful is not always expedient. "It is not what a lawyer tells me I *may* do, but what humanity, reason, and justice tell me I ought to do."[7] The Commonwealth has owed little or nothing to legalistic lucubration — except possibly some warnings. It was Burke who had "no very exalted opinion of the virtue of paper government," who placed his hope for the preservation of the Empire not in prescriptions of law but in imponderables, in "ties which,

though light as air, are as strong as links of iron."[8] And it was Burke who knew, quite as well as our modern political pluralists, that legal sovereignty is not omnipotence, that there are legal powers of government which, "being contrary to the opinions and feelings of the people," can in fact be exercised no more than if they had been legally abolished. In his writings more than a hint is to be found of that distinction between legal power and constitutional right which must be grasped if one is to understand the nature of the British Commonwealth and not to be too gravely disturbed by its seeming anomalies.[9] Burke's wisdom, however, had little enough immediate effect upon the British Government.

It has often been said that it was the American Revolution that caused Great Britain to adopt a more liberal colonial policy, resulting in the concession of self-government to the more advanced of her colonies. Such opinion has been expressed not only by well-intentioned orators inspired by the laudable motive of promoting Anglo-American goodwill, but by serious students of history as well.[10] But it is none the less erroneous. As a recent writer has said, it was not until Great Britain changed her colonial system that it was thought that lessons in colonial government could be learned from the break-up of the old Empire, and more than half a century had then elapsed since the Declaration of Independence.[11] During the fifty years or so subsequent to the loss of the Thirteen Colonies British colonial administration became more restrictive, not more liberal. This was probably in part because Great Britain was afraid that a liberal

colonial policy would result in further secessions from the Empire, in part because in the principal colonies which she retained, or acquired after the Revolution, there was no such tradition of local autonomy as there had been in the old colonies. "To prevent the further dismemberment of the Empire," wrote Lord Durham in his *Report on the Affairs of British North America,* "became the prime object of our statesmen, and an especial anxiety was exhibited to adopt every expedient which appeared calculated to prevent the remaining North American Colonies following the example of successful revolt."[12] The transportation of convicts to Australia, which began a few years after the American Revolution, did not tend to exalt the colonial status; C. B. Adderley (afterwards Lord Norton), an official in the Colonial Office and an authority on colonial administration, writing in 1850, suggested that the establishment of New South Wales as a penal settlement introduced "gaol principles" into British colonial policy.[13]

* * *

Lord Durham's *Report,* which was laid before Parliament in 1839, may be taken as the starting-point in the train of events that have given rise to the British Commonwealth. It is true that the ideas expounded in that great state paper were not original with Lord Durham, but he insured for them respectful consideration and gave them Empire-wide publicity. What the Queen's Commissioner had to say could not be brushed aside as the vaporings of a crack-brained radical. In an account of the Durham Mission, written in 1840, Charles Buller, who had served as

Durham's chief secretary, said that the *Report* had become "the textbook of every advocate of colonial freedom," that in Canada it was "the rallying-point of the great body of the people," in the West Indies and the Cape of Good Hope the colonists had "claimed the benefit of its principles," and in the Australasian colonies every newspaper was appealing to it as "the Manual of Colonial Reform." [14] The master idea presented in the *Report*, as is well known, was the introduction in the British North American colonies of responsible government, which then existed only in Great Britain. It is almost certain that the idea originated in Upper Canada, and it was at least ten years old at the time of the Durham Mission. In 1828 Dr. William Warren Baldwin, a member of the Assembly of Upper Canada and father of the reformer and statesman, Robert Baldwin, wrote to the Duke of Wellington, calling his attention to a "principle of the British Constitution, in the actual use of which the colonists alone hope for peace, good government and prosperity." This principle, he explained, was "the presence of a provincial ministry (if I may be allowed to use the term) responsible to the provincial parliament, and removable from office by his majesty's representative at his pleasure and especially when they lose the confidence of the people as expressed by the voice of their representatives in the assembly." [15] It is the opinion of the scholarly author of a recent monograph that credit should be given to Dr. Baldwin "as the earliest pioneer in the inestimably important field of propounding correctly the practice of the

British constitution." Robert Baldwin, who is remembered principally for his championship of responsible government, said that he owed the idea to his father.[16]

Responsible government was to become the political cornerstone of the British Commonwealth. It is today the badge of Dominion status, the system of government which the Dominions have in common with Great Britain, and which is not enjoyed by the dependent colonies. The latter are, in fact, officially designated as "colonies not possessing responsible government."[17] But those who advocated this reform in colonial government — Lord Durham, Charles Buller, Edward Gibbon Wakefield, Sir William Molesworth and other colonial reformers — had in mind nothing more than a system of colonial home rule. Some of them probably shared the belief, common in their day, that the colonies would ultimately part company with the mother country, but that they would become her equals in status while remaining within the Empire — this was beyond the horizon of their vision and the goal of their aspiration. They did not, they could not, foresee the amorphous structure that was to arise on the foundations that they were laying. In no sense were they "architects" of the British Commonwealth.[18] In the middle decades of the nineteenth century there were, indeed, some Englishmen who cherished the conception of a future voluntary, cooperative alliance of English-speaking peoples, which might even include the United States, but these optimists, paradoxical though it may seem, were active anti-imperialists or "separatists,"

and they believed that their ideal could be realized only after the colonies had separated formally from the mother country.[19]

The colonial reformers did not question the imperial sovereignty of Parliament, as the American Revolutionists had done. By 1830, the year usually taken as marking the beginning of their agitation, the conception of a "law of nature" that sets metes and bounds to all human authority, and the derivative doctrine of an English "constitution" above Parliament, had ceased to influence English legal and political thought. These ideas were already moribund in England,[20] though still able to give memorable account of themselves in the American colonies, when Blackstone wrote of Parliament: "It hath sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations, ecclesiastical or temporal, civil, military, maritime, or criminal: this being the place where that absolute despotic power, which must in all governments reside somewhere, is entrusted by the constitution of these kingdoms." [21] Yet even in Blackstone there is an echo of older legal doctrine, incompatible with "absolute despotic power," for in another passage in his *Commentaries* he declared that the "law of nature, being coeval with mankind, and dictated by God himself, is of course superior in obligation to any other," and that "no human laws are of any validity, if contrary to this." [22] In their general view of law and government most of the leaders in the movement for colonial

reform were Benthamites, and Bentham rejected and ridiculed the assumption of a subsistent "law of nature." According to the high priest of Utilitarianism appeals to natural law were nothing more than rationalization, ideological justification for resistance to acts of legislation deemed to be inexpedient. In his *Fragment on Government*, published in 1776, he offered this criticism of Blackstone's dictum regarding the supremacy of natural law:

As to the LAW *of Nature*, if (as I trust it will appear) it be nothing but a phrase; if there be no other medium for proving any act to be an offence against it, than the mischievous tendency of such act; if there be no other medium for proving a law of the *state* to be contrary to it, than the *inexpediency* of such law, unless the bare unfounded disapprobation of any one who thinks of it be called a proof; if a test for distinguishing such laws as would be *contrary* to the LAW *of Nature*, from such as, *without* being contrary to it, are simply *inexpedient*, be that which neither our Author, nor any man else, so much as pretended ever to give; if, in a word, there be scarce any law whatever but what those who have not liked it have found, on some account or another, to be repugnant to some text of scripture; I see no remedy but that the natural tendency of such doctrine is to impel a man, by the force of conscience, to rise up in arms against any law whatever that he happens not to like. What sort of government it is that can consist with such a disposition, I must leave to our Author to inform us.[23]

Being good Utilitarians, Lord Durham and his friends rested their case for colonial home rule on the ground of expediency, not of natural law.

Nor did they propose that Parliament, in its relation to

the colonies, should refrain from the use of all its legal powers. They had no notion of relegating it to the position of a mere *roi fainéant,* a sovereign *de jure* but not *de facto.* They had no fault to find with the exercise of its authority over the colonies when confined, as it usually had been, to matters of imperial, as distinguished from local, concern. The reform they championed was in the field of administration rather than of legislation. The object of their attack was not Parliament but the Colonial Office and the system of executive government in the colonies, under which, as Lord Durham said, those who administered public affairs did not enjoy the confidence of the popular branch of the colonial legislature.[24] They believed that the chronic friction which existed between the colonial executive and the assembly would be removed if administration in local affairs were entrusted to ministers responsible to the latter. They denied that this reform would result in the break-up of the Empire, as their opponents predicted, and maintained that it was, on the contrary, essential to its preservation. Though liberal imperialists, the colonial reformers were none the less imperialists. In fact, they were the only whole-hearted imperialists in England, for in political circles outside their ranks, colonies were generally regarded with indifference when they were not viewed with positive dislike.[25] It is evident that any scheme of local self-government involves a classification of governmental powers. If a community, forming part of a larger political entity, is subject to a local and a central government, the sphere of each must be marked out, in practice, at least, if not in law, if constant

friction between the two governments is to be avoided. The colonial reformers believed, and in this they were mistaken, that a stable division of powers could be made, and they had much to say of such a division, though they were not in precise agreement as to where the dividing line should be drawn. Probably the best known utterance on this subject is the following in Lord Durham's *Report*:

> Perfectly aware of the value of our colonial possessions, and strongly impressed with the necessity of maintaining our connexion with them, I know not in what respect it can be desirable that we should interfere with their internal legislation in matters which do not affect their relations with the mother country. The matters, which so concern us, are very few. The constitution of the form of government,— the regulation of foreign relations, and of trade with the mother country, the other British Colonies, and foreign nations, — and the disposal of the public lands, are the only points on which the mother country requires a control.[26]

Of the powers regarded by Durham as imperial some pertained to the royal prerogative — the making of war, peace and treaties — and the others were parliamentary. The making of constitutions for the colonies, the regulation of their external trade and the disposal of their public lands were of the latter sort.

Responsible government was finally established in Canada in 1848, and within the following ten years it had been extended to all the British North American and Australasian colonies, execpt British Columbia and Western Australia. But the constitutions of these colonies did not define the spheres of imperial and local authority. The colo-

nial legislatures had the right to make laws for the "peace, welfare and good government" of the colonies, but all laws passed by them, even those of a purely local character, were subject to disallowance in England by order in council, which meant, in practice, by the Colonial Office. In a speech in the House of Commons in 1850 Sir William Molesworth, then the leader of the colonial reformers, said:

> At present the colonial legislatures do not know what laws they may, and what laws they may not, make. In fact, they may at present make any laws whatever, affecting imperial interests in any manner whatever, provided the Colonial Office does not disallow them within a certain period of time. On the other hand, the colonial legislatures cannot make any law which the Colonial Office may not disallow.[27]

Molesworth had a great admiration for the United States Constitution, with its distribution of powers between the federal and the state governments, and he thought that Parliament ought to make provision, in the colonial constitutions, for a somewhat similar division of powers. His views on this subject were developed in speeches which he delivered in 1850 in debates in the House of Commons on a bill for the better government of the Australian colonies. After enumerating a number of powers which should be reserved to the Imperial Government, he proposed that the colonial legislatures be expressly forbidden to legislate with respect to them and, in addition, to establish slavery, alter the succession to the Crown, absolve any person from his allegiance, deprive any person of the right to appeal to the Sovereign in Council, make laws contrary to the law of

nations, define piracies and felonies committed on the high seas, make anything but gold or silver coin legal tender, define treason, pass bills of attainder, or impose differential duties or duties inconsistent with any treaty.[28] Molesworth was not the only British statesman who wished to see the range of colonial self-government thus positively limited by law. The idea commended itself to others, including Gladstone,[29] and was popular in the Australian colonies, where there was strong objection to the power of the Colonial Office to disallow colonial acts dealing with local matters. In new constitutions for New South Wales and Victoria, framed by the legislatures of those colonies in 1853 and 1854, subjects of imperial concern were enumerated, and the right of disallowance was confined to colonial acts dealing with those subjects. The Imperial Government, however, declined to permit these provisions of the colonial constitutions to stand.[30] If Molesworth and Gladstone and the Australian reformers had had their way, colonial self-government would have remained strictly local self-government, and the subsequent evolution of the British Commonwealth would have been impossible.[31] It has come about through a progressive expansion of the sphere of colonial self-government from limited autonomy to the complete self-determination of present Dominion status and the corresponding contraction of imperial control to the vanishing point.

It was not long before the instability of such a division of powers as Lord Durham proposed became evident. Soon after the union of Upper and Lower Canada, provided for by Act of Parliament in 1840, the right of the legislature

of the new province to regulate the disposal of the public lands was conceded, and this power was subsequently acquired by all colonies with responsible government. By the Australian Colonies Government Act (1850) the legislatures of those colonies were empowered to levy such duties as they pleased upon imports, from the United Kingdom as well as from foreign countries, subject only to the proviso that they must not impose differential duties.[32] This restriction was removed in 1873.[33] A Canadian tariff of 1859 provided for protective duties on British as well as foreign goods, and when the possibility that it would be disallowed was mooted, the Government of Canada boldly and successfully asserted the right of the colonial legislature "to adjust the taxation of the people in the way they deem best, even if it should unfortunately happen to meet the disapproval of the imperial ministry."[34] The legal power of disallowance was not exercised, and the right of the colony to regulate its own external trade was thereby conceded. It should be remarked, furthermore, that when powers previously regarded as imperial were acquired by colonies, colonial control became, in practice if not in legal theory, exclusive. With regard to the making of colonial constitutions, which Durham viewed as an imperial function, important concessions were soon made to the colonies. In 1850 the single-chamber legislative councils of the Australian colonies were authorized to alter electoral franchises and to establish bicameral legislatures, provided that bills passed by them for such purposes should be reserved and that copies should be laid before both Houses of the Imperial Parliament

before the royal pleasure was signified.[35] By the Colonial Laws Validity Act (1865) it was provided that any representative colonial legislature might "make laws respecting the constitution, powers, and procedure of such Legislature; provided that such laws shall have been passed in such manner and form as may from time to time be required, by any Act of Parliament, letters patent, Order in Council, or colonial law for the time being in force in the colony."[36]

More significant than the concession to colonial legislatures of such partial constituent powers was the passing of initiative in constitution-making from the mother country to the colonies. This is illustrated by a comparison of the British North America Act of 1867 with the Canada Union Act of 1840. Both were Acts of the British Parliament, but the circumstances of their enactment were radically different. In the case of the latter, which served as the constitution of the Province of Canada from 1841 to 1867, the initiative was taken by the British Government. The former, the constitution of the Dominion of Canada, was based upon resolutions drafted at Quebec in 1864 by a conference of delegates of the British North American colonies, and was given final shape as a result of conferences between representatives of the colonies and of the British Government held in London in 1866-7.[37] It was, as has been said, a product of colonial statesmanship, and the Quebec Conference gave "an example and an inspiration to states yet unborn within the empire."[38] To quote Mr. Justice Riddell of the Supreme Court of Ontario, the British North America Act "is in form and legal effect a Statute of the Imperial Par-

liament at Westminster; in fact, it is a contract agreed upon by Canadian statesmen and given legal validity by the Imperial Parliament."[39] In the Union Act there is no reference to colonial wishes, but in the preamble of the British North America Act it is declared that "the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their desire to be federally united into one Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in principle to that of the United Kingdom." When the Quebec Resolutions were under debate in the Parliament of Canada in 1865 a French Canadian representative said: "As regards the sentiments of Great Britain in relation to us, the events which have taken place since the union show that they are altogether changed. In 1840 we had a Constitution imposed upon us against our will, and by so doing Great Britain was guilty of injustice towards us. Now they await our decision before they act."[40] The later Dominion constitutions, those of the Commonwealth of Australia, the Union of South Africa and the Irish Free State, were framed by conventions held in those countries, legal effect being given to them by the Imperial Parliament.[41]

* * *

The development of the self-governing colonies (officially styled Dominions since 1907) to their present status has taken place under the potent influence of colonial nationalism. Whatever the factors involved in nationalism may be — it is unnecessary for our purpose to enter upon an examination of them — their operation can be traced in the history

of Canada and Australia and South Africa no less than in that of Germany or Italy. If the British colonies in North America had remained as they were when they first secured responsible government, small communities, provincial in outlook, politically separate from one another and lacking in the essentials of national existence, there would have been no substantial basis for a claim to equality of status with Great Britain, and the same is true of the Australian and South African colonies. Under such conditions the British Commonwealth of Nations could not have arisen. The history of Newfoundland shows that responsible government does not, of itself, necessarily lead to a desire for full self-determination. This smallest of British Dominions much prefers to think of itself as the oldest of British colonies. It has not sought the equality of status that has been thrust upon it. "The message I would bring from Newfoundland today," said the Prime Minister of the Dominion, speaking at the Imperial Conference of 1926, "is that we are entirely satisfied with the flag under which we live; we are entirely satisfied with the status under which we exist and we do not even require to be consulted as to questions of foreign policy. We are perfectly satisfied that the Ministers who are in charge of Great Britain's affairs today are fully capable of dealing with them without any assistance from us, and, if their deliberations should ever bring the Empire to war, we are perfectly willing to come in, feeling satisfied that we are fighting for a just cause." [42] These were the words of a loyal British colonist, not of an ardent Newfoundland patriot.

The phenomenon of colonial nationalism first appeared in the North American colonies, and it carried with it, from the outset, a new conception of imperial relationship. In 1865, when the resolutions of the Quebec Conference were under debate in the Parliament of the Province of Canada, Sir John Macdonald professed his faith in a great national destiny awaiting a united British North America *in alliance with* Great Britain. He said:

The colonies are now in a transition state. Gradually a different colonial system is being developed — and it will become, year by year, less a case of dependence on our part, and of overruling protection on the part of the Mother Country, and more a case of a healthy and cordial alliance. Instead of looking upon us as a merely dependent colony, England will have in us a friendly nation — a subordinate but still a powerful people — to stand by her in North America in peace or in war.[43]

Another speaker said:

I do not deny that the effect of the present movement may be to change the character of the actual relations which subsist between this province and the Mother Country. . . . . But I maintain . . . . that the change will be of that character, that, instead of loosening or weakening or diminishing the connection with the Mother Country, it will tend to put it on a footing which will make it stronger and more enduring. . . . . But, whether by this inevitable change the country shall gradually lose its dependent or protected character and assume more of the Federal relation, constituting this a territorial division of the Empire, I believe it will result in placing those relations on a surer and more steadfast footing, and that we will still acknowledge the same Sovereign, owe the same fealty, and maintain the same veneration for the English Constitution and name.[44]

Macdonald was the most influential of the colonial delegates who participated in the drafting of the British North America Act, and it is well known that if he had had his way the Confederation would have been officially styled "The Kingdom of Canada"; but Lord Derby, the British Prime Minister, was afraid that the establishment of a "kingdom" in North America would ruffle republican sensibilities in the United States, and "Dominion" was substituted for "Kingdom." In a letter written in 1889 Macdonald said that if Canada had been declared to be "an auxiliary Kingdom," the Australian colonies would already have applied to be placed in the same rank.[45] It seems clear, then, that the "Fathers of Confederation" contemplated some sort of super-colonial status, not precisely defined, for the intercolonial union which they were founding. The most that they aspired to probably fell short of present-day Dominion status, and even Macdonald did not claim for his "Kingdom of Canada" full equality with Great Britain. Yet they laid the political framework within which Canada has advanced to her present constitutional position. It is, however, a very significant feature of the Confederation debates of 1865 that the most emphatic expressions of colonial nationalism were accompanied with explicit declarations of a desire to remain within the British Empire, under the British Crown and in intimate association with the British people; and Canada and the other Dominions today, while undoubtedly nations, are, by reason of their membership in the British Commonwealth, something different from the self-regarding and egocentric

nations with which the history of modern Europe makes us familiar.

* * *

In all working constitutional systems law is supplemented to some extent by usage and convention, but in no others is it negatived by convention in anything like the same degree as in the constitution of Great Britain and of the British Commonwealth. When legal powers which have never been formally abolished fall into disuse, it may come to be recognized that they can no longer be exercised. The British constitution abounds in such legally existent but practically obsolete powers. Two illustrations will suffice. For more than two hundred years the power of the Sovereign to withhold assent to bills passed by the Lords and Commons has not been used. It has not been formally renounced or restricted by law, and it remains legally unquestionable, but long since — we must not ask for a precise date — it ceased to be exercisable. Again, in earlier times Parliament often passed bills of attainder; and the sovereignty of Parliament (i.e., its legally unlimited power) is, as Dicey showed,[46] the dominant principle of English constitutional law. But Parliament can no longer, in fact, pass bills of attainder. In both these cases, and in many others, adverse conventions have grown up which virtually and effectively nullify the legal powers in question. It is, indeed, through the over-riding of legal powers by constitutional conventions that a monarchy has been transformed into a democratic republic, and an empire into a commonwealth of nations. If the King could exercise at his personal

discretion the powers with which the letter of the law invests him, it would be absurd to speak of Great Britain as a democracy, and if the imperial sovereignty which Parliament claimed in the Declaratory Act of 1766 were a reality, there could be no British Commonwealth. The distinction between "legal power" and "constitutional right" was stressed by Sir Robert Borden, then Prime Minister of Canada, at the Imperial War Conference of 1917. In the course of a debate on the famous "Constitutional Resolution," which Borden introduced, General Smuts, Prime Minister of South Africa, expressed the opinion that the Dominions were "subject Provinces of Great Britain," and that their status as equal nations of the Empire would "have to be recognized to a very large extent." In reply Borden said:

> I entirely agree with General Smuts that, according to the form of the Constitution at present, the conditions are as he suggests. It is to be observed, however, that constitutional writers draw a sharp distinction between legal power and constitutional right. The British Parliament has technically the legal power to repeal the British North America Act — taking our Dominion as an illustration. But there is no constitutional right to do so without our assent, and therefore, while there is the theory of predominance, there is not the constitutional right of predominance in practice, even at present.[47]

The distinction to which the attention of the statesmen of the Commonwealth was thus directed was further emphasized in the debates in the Canadian Parliament on the Treaty of Versailles, and it is now a common-place.[48]

From the standpoint of legal power the legislative supremacy of the British Parliament over the Dominions is unquestioned.[49] In the case of Canada, to which, for brevity's sake, we may confine our attention, this has been fully recognized in judicial opinions, and no other Dominion claims greater rights and immunities than Canada enjoys.[50] By the British North America Act, section 91, the Parliament of Canada is empowered to make laws for "the peace, order, and good government" of the Dominion "in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces," and for greater certainty it is provided that "the exclusive Legislative Authority of the Parliament of Canada" extends to certain enumerated subjects. In section 92 the subjects falling under the exclusive legislative authority of the provinces are enumerated. In an Ontario case of 1875, Regina *v.* Taylor, Draper, C. J., said that the Imperial Parliament, in grating "exclusive" powers to the Parliament of Canada, intended to renounce its own authority in the premises.[51] In Holmes *v.* Temple, Chauveau, J., in Sessions of the Peace, Quebec, also, in the words of Lefroy, the leading authority on Canadian constitutional law, "appears to have interpreted the word 'exclusive,' in section 91 of the British North America Act, as meaning exclusive not only of the provincial legislatures, but of the Imperial Parliament itself." [52] This view was repudiated, however, in the Ontario case of Smiles *v.* Belford (1876). One of the subjects specified in the British North America Act as within the "exclusive" authority of the Dominion Parliament is

copyright, and the court was called upon in this case to decide whether a Dominion Copyright Act of 1875 had superseded an earlier Imperial Copyright Act. In giving judgment, Proudfoot, V. C., said: "There is nothing indicating any intention of the Imperial Parliament to abdicate its power of legislating on matters of this kind," and on appeal to the Ontario Court of Appeal his decision was affirmed. Burton, J. A., said that what the British North America Act intended to effect was "to place the right of dealing with colonial copyright within the Dominion under the exclusive control of the parliament of Canada, as distinguished from the provincial legislatures," just as it had "transferred the power to deal with banking, bankruptcy and insolvency, and other specified subjects, from the local legislatures, and placed them under the exclusive jurisdiction and control of the Dominion." He concurred with Proudfoot that under the British North America Act "no greater powers were conferred upon the parliament of the Dominion to deal with this subject than had been previously enjoyed by the local legislatures." [53] Never since Smiles *v.* Belford, says Lefroy, has the paramount authority of the Imperial Parliament over and within the Empire been questioned.[54] All subsequent Canadian decisions have upheld this view, and it is accepted as a matter of legal form by the most zealous champions of Canadian rights.[55]

The Imperial Conference, like the Commonwealth of which it is the central organ, rests upon convention, not law. It possesses no legislative power, but, partly for that very reason, it is excellently fitted to make declarations of

pre-existing constitutional right,[56] and when, in 1926, it recorded that Parliament no longer legislates for Dominions without their consent, it was making such a declaration. The Conference did not, of course, undertake to say just how and when an authority that had not been formally surrendered or repudiated became extinct in practice, nor must we, but as a rough indication of its decline we may take the testimony of a few witnesses.

The first edition of Dicey's classic treatise on the Law of the Constitution was published in 1885, the eighth and last in 1915. During the intervening period some important changes had taken place in the constitution, both in its law and in its conventions, and of these the author took note in the Introduction which he prefixed to the 1915 edition. Under the heading, "Practical change in the area of parliamentary sovereignty," he compared the relation of Parliament to the self-governing colonies in 1884 with its relation to the Dominions in 1914 and reached the conclusion that at the former date "England conceded to the self-governing colonies as much of independence as was necessary to give to such colonies the real management in their internal or local affairs," while in 1914 it was her policy to grant to every Dominion "absolute, unfettered, complete, local autonomy, in so far as such perfect self-government by a Dominion does not clearly interfere with loyalty of the Dominion to the Empire."

The two relations of England to the self-governing colonies — now called Dominions — are, it may be objected, simply one and the same relation described in somewhat

different language. The objection is plausible, but not sound. My effort has been to describe two different ways of looking at one and the same relation, and the results of this difference of view are of practical consequence. In 1884 it was admitted, as it is today, that the self-governing colonies must have rights of self-government. But in 1884 the exercise of self-government on the part of any colony was regarded as subordinate to real control by the English Parliament and Crown of colonial legislation which might be opposed to English interests or to English ideals of political prudence. In 1914 the self-government, *e.g.*, of New Zealand means absolute, unfettered, complete autonomy, without consulting English ideas of expediency, or even of moral duty. The limit to this complete independence in regard to local government is that it is confined to really local matters and does not trench upon loyalty to the Empire. The independence of the Dominion, in short, means nowadays as much of independence as is compatible with each Dominion remaining part of the Empire.[57]

We gather from this that Parliament's practical authority over the Dominions was more restricted in 1914 than it had been in 1884, that a significant change in opinion on the subject took place during this period. But if we descend to particulars and ask what kinds of laws affecting the Dominions Parliament was passing at the former date and had ceased to pass at the latter, Dicey gives us no answer. When a writer so well-informed, clear-headed and lucid of style leaves such an indefinite impression, there is little risk in assuming that facts do not warrant a very definite one.

Other general statements made before and during the World War are little less vague. Thus Mr. (now Sir) Charles Lucas, in his edition of Sir George Cornewall Lewis's *Essay on the Government of Dependencies*, pub-

lished in 1891, said: "The Imperial Parliament . . . . is supreme over all the colonies, whether or not possessing Responsible Government, and can make laws upon any subject binding them. . . . . In practice this paramount power of legislation by the Imperial Parliament is only exercised by acts conferring constitutional powers, or dealing with a limited class of subjects of special Imperial or International concern, such as merchant shipping or copyright." [58] According to Sir Henry Jenkyns, writing at the close of the last century, there was a "constitutional understanding" that imperial legislation affecting a self-governing colony should, except where "imperial interests" were concerned, be enacted only after communication with the colonial government, but he added: "In the statement of constitutional rules it must be recollected that any emergencies may cause them to be broken. Improper action by the colonists or a particular party of them might compel Parliament to legislate in disregard of the ordinary maxims of policy," [59] Mr. Edward Jenks, well known as a writer on legal and political history, in a work published in 1918, observed that the power of the Imperial Parliament to legislate for the Dominions was "very rarely exercised," and that the few acts applying to them that had been passed in recent years dealt with such subjects as nationality and the position of aliens, merchant shipping and copyright, subjects on which uniformity of legislation was clearly desirable.[60]

Our impression of the waning of Parliament's legislative authority over the Dominions may perhaps be sharpened somewhat by reference to two acts dealing with the sub-

ject of copyright. The International Copyright Act of 1886 provided that it should, except under specified conditions, "apply to every British possession as if it were part of the United Kingdom." [61] The expression "British possession" was used here, as regularly in Acts of Parliament, to include the self-governing colonies, and the latter were not referred to as such in the statute. The Copyright Act of 1911, on the other hand, provides that it "shall not extend to a self-governing dominion, unless declared by the Legislature of that dominion to be in force therein," and it authorizes the legislature of any such dominion to repeal "all or any of the enactments relating to copyright passed by Parliament (including this Act) so far as they are operative within that dominion," saving all legal rights existing at the time of such repeal.[62]

It is well known that advance in the constitutional position of the Dominions was most rapid during the years of the World War. Such innovations as the Imperial War Cabinet, in which British and Dominion ministers sat together as colleagues, and the separate representation of the Dominions at the Peace Conference, caught the attention of the public, and by the year 1919 statesmen in Great Britain, as well as in the Dominions, were openly proclaiming that equality of status was the cornerstone of the British Commonwealth. Speaking in the House of Lords in July of that year, Lord Milner said: "The only possibility of a continuance of the British Empire is on a basis of absolute out-and-out equal partnership between the United Kingdom and the Dominions." By common consent, we may

say, the constitutional right of Parliament to legislate for the Dominions, without their approval, had ceased to exist.[63] In a lecture delivered in 1921 Sir Robert Borden said:

With the material growth and constitutional development of the oversea nations the Parliament of the United Kingdom has ceased to be an Imperial Parliament in any real sense so far as the Dominions are concerned. Its legal power is subject to the limitations of constitutional right. Theoretically it has power to impose direct taxation or compulsory military service upon the people of any Dominion; constitutionally and practically it possesses no such right or authority. The exercise of any power contrary to established or developing conventions would have legal sanction, but would not be respected, and in the end could not be enforced.[64]

The same thought was expressed by Mr. Justice Riddell of the Supreme Court of Ontario in 1923:

It is in law within the power of the Imperial Parliament to legislate for all the British world, including Canada — legislation concerning Canada would be undoubtedly valid in law, but that for which the Fathers of the Revolution fought, namely, that there should be no legislation without representation, is now thoroughly established in the British Commonwealth. Now for the Imperial Parliament to legislate for Canada without her previous request or subsequent assent, would be unconstitutional, and such a proceeding is unthinkable.[65]

It has been said that the Imperial Conference of 1926 officially affirmed the principle of equality of status. But it must not be supposed that general acceptance of this principle has automatically solved all the problems of the

Commonwealth. As Lord Milner foresaw ten years ago, the working out in practice of the principle of equality, without severing the relations between Great Britain and the Dominions, is a very difficult enterprise of statesmanship. Where the existing legal powers of the British Crown and Parliament do not interfere with the recognized constitutional rights of a Dominion, either because they are not exercised, or are exercised only at the request of the Dominion, they present no practical difficulty. But the Report of the Committee on Inter-Imperial Relations, appointed by the Imperial Conference, makes it clear not only that there are certain forms and practices, survivals of an earlier stage in constitutional evolution, which are not in accord with the principle of equality, but that some of these might cause, as indeed they have caused, inconvenience and friction.[66] For example, the Colonial Laws Validity Act of 1865 laid it down that any colonial law repugnant to the provisions of any Act of Parliament extending to the colony should, to the extent of such repugnancy, be void and inoperative,[67] and in pursuance of this enactment the Judicial Committee of the Privy Council in 1926 held a certain article of the Criminal Code of Canada to be invalid.[68] In a recent case the High Court of Australia declared a provision in an Australian Navigation Act to be inoperative on the ground that it was repugnant to an enactment of the Imperial Merchant Shipping Act of 1894.[69] The removal of surviving legal restrictions upon the Dominions is a subject that involves difficult questions, and

these are to be examined in the near future by a committee representative of Great Britain and the Dominions. But it is agreed on all sides that such restrictions have become anomalies, and that they must not be permitted to interfere with the exercise by any Dominion of its constitutional rights.

NOTES AND REFERENCES

Chapter I

[1] *The American Colonies in the Seventeenth Century*, III, 9.

[2] *The American Revolution*, 22.

[3] *Ibid.*, 9.

[4] The documents in this controversy can be found in Rushworth, *Historical Collections*, Part III (London, 1692), I, 526 *et seq.*

[5] A suggestive essay by Theodore F. T. Plucknett, entitled "The Lancastrian Constitution," tends to show that the modernity which has been ascribed to the fifteenth-century English constitution is illusory. See *Tudor Studies*, 161-81.

[6] William Prynne, *The Treachery and Disloyalty of Papists to their Soveraignes, in Doctrine and Practise. Together with the First Part of The Soveraigne Power of Parliaments and Kingdomes* (2d ed., London, 1643), 47; *The Soveraigne Power of Parliaments and Kingdomes*, Part II, 73 *et seq.*

[7] 12 Car. 2, c. 12.

[8] 13 Car. 2, c. 1.

[9] Firth and Rait, *Acts and Ordinances of the Interregnum, 1642-1660*, III, iv, xviii.

[10] *Introduction to the Study of the Law of the Constitution* (8th ed.), 37.

[11] The fiction that rebels in arms against their King were his loyal subjects is evidence of the strength of monarchical sentiment and of the spirit of legalism. It was not invented by the English Puritans. The Scotch Covenanters, while engaged in hostilities with Charles I in 1639, professed loyalty to him (Robert S. Rait, *The Parliaments of Scotland*, 67). So, also, and with better reason, did the Irish Catholics during the Rebellion of 1641.

[12] A striking illustration of the invincible instinct of the Puritans to seek in history a justification for their innovations, to represent revolution as restoration, is afforded by the Act of the Rump abolishing the kingship (March 17, 1649). In this culminating act of revolution it was declared that "a most happy way is made for this Nation (if God see it good) to return to its just and ancient

Right of being governed by its own Representatives or National Meetings in Council, from time to time chosen and entrusted for that purpose by the people.'' Firth and Rait, *op. cit.*, II, 19-20.

[13] *The Evolution of Parliament* (2d ed., London, 1926), 259.

[14] This meaning was not commonly attached to the term before the eighteenth century. The word ''empire'' (*imperium*) had been used in England in medieval and early modern times, but it had then connoted independence, especially ecclesiastical independence of the papacy, not the possession of dependencies. This was the sense in which it was used in the Act of Appeals of 1533, in which the realm of England was declared to be an empire. For this use of the word, see F. J. C. Hearnshaw, *Democracy and the British Empire*, s. i. For the history of the term in its modern sense, see *The Scottish Historical Review*, XV, 185-87, and *The American Historical Review*, XXVII, 485-89.

[15] Like their predecessors the Stuarts claimed to be Kings of France also, but this claim had long been no better than a farcical pretence. In *Calvin's Case* (1608), according to Coke's report, the judges were of opinion that though the King of England had ''absolute right'' to the Kingdom of France, ''yet seeing the King is not in actual possession thereof, none born there since the crown of England was out of actual possession thereof, are subjects to the King of England.'' Coke, *Reports* (London, 1826), IV, 31. It would have been a nice exercise in legalistic logomachy to reconcile this opinion with the implications of the doctrine of indefeasible hereditary right as held by James I.

[16] Firth and Rait, *op. cit.*, II, 122.

[17] The Rump had already abolished the monarchy and the House of Lords.

[18] In Acts of January 30 and March 17, 1649, the dominions were referred to as belonging to the people of England.

[19] E.g., 25 Hen. 8, c. 19, s. 3; 35 Hen. 8, c. 3, s. 1; 2 & 3 Edw. 6, c. 1, s. 1; 1 Eliz., c. 1, s. 16; 35 Eliz., c. 1, s. 3; 3 Jac. 1, c. 4, s. 9; 3 Car. 1, c. 3, s. 1; 16 Car. 1, c. 8, s. 1.

[20] E.g., 1 Edw. 6, c. 5, s. 1; 1 & 2 Phil. & Mary, c. 8, s. 2; 3 Jac. 1, c. 1, s. 1; 1 Car. 1, c. 1, s. 1.

[21] E.g., 25 Hen. 8, c. 21, s. 2; 1 Eliz., c. 1, s. 16; 27 Eliz., c. 2, s. 2; 1 Jac. 1, c. 11, s. 1; 16 Car. 1, c. 23, s. 1.

[22] The term ''British possession'' was defined in the Interpretation Act, 1889, as ''any part of Her Majesty's dominions exclusive of

the United Kingdom'' (52 & 53 Vict., c. 63, s. 18), but the use of this expression is distinctly modern.

[23] In the words of Dicey, Parliament's claim to the possession of ''absolute sovereignty throughout every part of the British Empire'' would be admitted as ''sound legal doctrine by any court throughout the Empire which purported to act under the authority of the King.'' *Introduction to the Study of the Law of the Constitution* (8th ed.), xxv-xxvi. Legalistically speaking, Dicey's statement remains true, though Parliament's power to legislate for the self-governing colonies has been nullified in practice by adverse constitutional usage and is now defunct.

[24] *The American Revolution*, 24, n. We need not inquire here whether a distinction can properly be drawn between the right to *declare* law for the dominions and the right to *make* law for them, a distinction that figures prominently in Professor McIlwain's essay.

[25] W. R. Williams, *The Parliamentary History of the Principality of Wales*, iii.

[26] *Statutes of the Realm*, I, 55. Edward I, in the words of Professor Tout (*Edward the First*, 119), ''never sought to annex the Principality to England, although he incorporated it with the English crown.''

[27] *The Reports of Sir Edward Coke* (London, 1826), IV, 37.

[28] *The Fourth Part of the Institutes of the Laws of England* (ed. of 1797), 239.

[29] E.g., 2 Hen. 4, c. 17; 5 Hen. 4, c. 15; 2 Hen. 6, c. 4.

[30] *The Works of the Right Honorable Edmund Burke* (Boston, 1869), II, 148-49. Burke thought that this legislation for Wales had been inexpedient and unstatesmanlike, but he did not question its legality. As an example of the Acts of Parliament to which he referred mention may be made of a statute of 1534 containing a number of enactments for Wales, one of which was that no person resident in the principality or its marches should come under arms to any court to be held therein, on pain of forfeiture of the arms, fine and imprisonment; 26 Hen. 8, c. 6.

[31] 27 Hen. 8, c. 26.

[32] *Parliamentary Papers*, 1878, LXII, Part I, 374. W. R. Williams, *op. cit.*, iv.

[33] According to Coke, Calais was ''a part of the kingdom of France, and never was parcel of the kingdom of England, and the Kings of England enjoyed Calais . . . . by the same title that they had to France.'' *Reports* (ed. of 1826), IV, 38.

[34] G. A. C. Sandeman, *Calais under English Rule*, 3, says that "as a colony it was in a sense unique, for Calais is the only instance of a colony founded on the Greek system — the ousting of the native population in favour of an immigrating community of the conquerors."

[35] 1 Hen. 5, c. 9.

[36] 9 Hen. 5, stat. 1, c. 6.

[37] 27 Hen. 6, c. 2.

[38] 1 Hen. 7, c. 3.

[39] 1 Hen. 7, c. 8. This prohibition applied to England, Wales, Ireland, Calais and Berwick.

[40] 27 Hen. 8, c. 63.

[41] *The Chronicle of Calais, in the Reigns of Henry VII and Henry VIII to the year 1540*, ed. by John Gough Nichols (Camden Soc.), 166-67.

[42] *Letters and Papers, Foreign and Domestic, of the Reign of Henry VIII*, ed. by James Gairdner, X, 459.

[43] *Parl. Papers*, 1878, LXII Part I, 374, 377, 380, 384, 388, 392, 395, 396-99.

[44] 1 Edw. 6, c. 14, s. 7.

[45] *Ordres du Conseil et Pièces Analogues enregistrés à Jersey* (6 vols., Jersey, 1897-1906), I, 27-28.

[46] *The Rights and Immunities of the Island of Guernsey, most humbly submitted to the Consideration of Government; in a Speech of one of the Magistrates of that Island to the Royal Court there* (London, 1771), iv-vi, 4; *Cobbett's Parliamentary Debates*, V, 629; Charles Le Quesne, *A Constitutional History of Jersey* (London, 1856), 297-98, 389; William Berry, *The History of the Island of Guernsey* (London, 1815), chap. xv; Abraham Jones Le Cras, *The Laws, Customs, and Privileges, and their Administration, in the Island of Jersey* (London, 1839), x, 11-12.

[47] Minute of the Lords of the Committee of Council for the Affairs of Guernsey and Jersey, April 28, 1806, quoted in Le Cras, *op. cit.*, 70-71.

[48] Le Cras, *op. cit.*, 70; Berry, *op. cit.*, 224-25.

[49] *Parl. Papers*, 1847, XV, "First Report of the Commissioners appointed to inquire into the state of the Criminal Law in the Channel Islands," xi.

[50] *Ordres du Conseil et Pièces Analogues enregistrés à Jersey*, II, 22-23, 33, 36.

[51] *Ibid.*, III, 72-73.

[52] 7 & 8 Gul. 3, c. 21, s. 10.

[53] 10 Anne, c. 17, s. 3.

[54] 2 Geo. 2, c. 7.

[55] *Ordres du Conseil et Pièces Analogues enregistrés à Jersey*, III, 70-73.

[56] Selden, *Titles of Honor* (2d ed., London, 1631), Part I, chap. iii. For the history of Man, see Spencer Walpole, *The Land of Home Rule*, and A. W. Moore, *History of the Isle of Man.*

[57] "Manx Society Pubs.," V, 107.

[58] 33 Hen. 8, c. 31; A. W. Moore, *Sodor and Man*, 99.

[59] Coke, *The Fourth Part of the Institutes of the Laws of England*, chap. lxix; 5 Geo. 3, c. 26, preamble.

[60] Referred to in 5 Geo. 3, c. 26, preamble; *An Abstract of the Laws, Customs, and Ordinances of the Isle of Man, compiled by John Parr*, I, ed. by James Gell, "Manx Soc. Pubs.," XII, 45 *et seq.* The text of the act of 1610 is given, 61-64.

[61] *The Land of Home Rule*, 114.

[62] 12 Car. 2, c. 11, s. 5.

[63] William Harrison, *Illiam Dhône, and the Manx Rebellion, 1651*, "Manx Soc. Pubs." XXVI, 44.

[64] Order in Council, August 5, 1663, quoted in "Manx Soc. Pubs.," XXVI, 55-56.

[65] *Commentaries on the Laws of England*, ed. by William Draper Lewis, I, 92.

[66] 26 Hen. 8, c. 13, s. 1.

[67] 35 Hen. 8, c. 3, s. 1.

[68] 32 Hen. 8, c. 49.

[69] *Ordres du Conseil et Pièces Analogues enregistrés à Jersey*, I, 5.

[70] 1 Edw. 6, c. 5, s. 1.

[71] 1 & 2 Phil. & Mary, c. 11, s. 2.

[72] 27 Hen. 8, c. 14, ss. 1 and 2.

[73] 8 Eliz., c. 3, ss. 1 and 3.

[74] 13 Eliz., c. 11, s. 2.

[75] 23 Eliz., c. 1, s. 1.

[76] 27 Eliz., c. 2, s. 1.

[77] 1 & 2 Phil. & Mary, c. 8, s. 1.

[78] On the eve of the American Revolution it was urged by Americans who disputed Parliament's right to interfere in colonial affairs that James I and Charles I had held this opinion. See, e.g., *Speeches*

of the Governors of Massachusetts from 1765 to 1775; and the Answers of the House of Representatives to the same (Boston, 1818), 355.

[79] *Proceedings and Debates of the House of Commons, in 1620 and 1621*, by a Member of that House (2 vols., Oxford, 1766), I, 318. See also *Proceedings and Debates of the British Parliaments respecting North America*, ed. by Leo Francis Stock, I (Washington, 1924), 36-37, 39.

[80] *Proc. and Deb. of the House of Commons*, cited above, I, 319.

[81] *Ibid.*, II, 258.

[82] *Proceedings and Debates of the British Parliaments respecting North America*, I, 65, 67, 68.

[83] 3 Jac. 1, c. 1, s. 1.

[84] 3 Jac. 1, c. 4, s. 14.

[85] 1 Car. 1, c. 1, s. 1.

[86] 3 Jac. 1, c. 26, s. 28; 7 Jac. 1, c. 23, s. 28; 21 Jac. 1, c. 33, s. 28; 1 Car. 1, c. 6, s. 30; 3 Car. 1, c. 8, s. 33; 16 Car. 1, c. 2, s. 20.

[87] 1 Jac. 1, c. 33, s. 1.

[88] 16 Car. 1, c. 8, s. 1.

[89] *The Fourth Part of the Institutes of the Laws of England* (ed. of 1797), 281, 287, 351; *The Reports of Sir Edward Coke* (ed. of 1826), IV, 30.

[90] For cases of medieval legislation by Parliament for Gascony, see 27 Edw. 3, stat. 1, c. 7; 42 Edw. 3, c. 8; 23 Hen. 6, c. 17.

[91] 2 Hen. 6, c. 4.

[92] 1 Hen. 5, c. 8.

[93] 1 Hen. 6, c. 3.

[94] 31 Edw. 3, stat. 4, *The Statutes of the Realm*, I, 357.

[95] 27 Edw. 3, stat. 2.

[96] *The Statutes of the Realm*, I, 332, note.

[97] *Statutes and Ordinances, and Acts of the Parliament of Ireland, King John to Henry V*, ed. by Henry F. Berry under the direction of the Master of the Rolls in Ireland (Dublin, 1907), 323-29.

[98] *Records of the Parliament holden at Westminster on the Twenty-Eighth Day of February, in the Thirty-Third Year of the Reign of King Edward the First*, ed. by Frederic William Maitland under the direction of the Master of the Rolls (London, 1893), xxxvi. This volume is commonly cited as *Memoranda de Parliamento*.

[99] *The Statutes of the Realm*, I, 193-94.

[100] *The Statutes of the Realm*, I, 194; *Statutes and Ordinances, and Acts of the Parliament of Ireland*, 295.

[101] *Statutes and Ordinances, and Acts of the Parliament of Ireland*, 301.

[102] *Ibid.*, 297.

[103] *The Statutes of the Realm*, I, 53, 98.

[104] *Ibid.*, 100. *Statutes and Ordinances, and Acts of the Parliament of Ireland*, 103.

[105] *Statutes and Ordinances, and Acts of the Parliament of Ireland*, 47.

[106] N. S. B. Gras, *The Early English Customs System*, 59-61.

[107] This is in French and is printed in *The Parliamentary Writs*, ed. by Francis Palgrave, I, 1, and in Gras, *op. cit.*, 223-24. There is an English abstract in *Calendar of Fine Rolls*, I, 47.

[108] *Parl. Writs*, I, 2.

[109] *Ibid.*, I, 1.

[110] Gras, *op. cit.*, 64.

[111] *Parl. Writs*, I, 381.

[112] A similar distinction was made in the writ to the justiciar of Ireland, mentioned above.

[113] *Parl. Writs*, I, 1. Gras, *op. cit.*, 223-24. For an abstract, see *Calendar of Documents relating to Ireland, 1252-1284*, ed. by H. S. Sweetman, 195.

[114] *Dictionary of National Biography*, LXI, 373; *Calendar of Documents relating to Ireland, 1171-1251*, 433.

[115] The Latin text of this charter is in *Parl. Writs*, I, 2, and in Stubbs, *Select Charters* (6th ed.), 451-52. There is an English translation in Adams and Stephens, *Select Documents of English Constitutional History*, 69-70. The King had previously undertaken that the grant which had been made to him by the magnates in parliament should not prejudice the liberties which they enjoyed in their ports. *Cal. Docs. rel. to Ireland, 1252-1284*, 194.

[116] *Parl. Writs*, I, 1. "Et quia volumus quod dicta consuetudo nobis in terra nostra Hiberniae concedatur et simili modo capiatur, Vobis mandamus quod Archiepiscopos, Episcopos, Abbates, Priores, Comites, Barones, Communitates et mercatores de terra predicta, modis quibus expedire videritis, inducatis ad concedendam nobis consimilem consuetudinem percipiendam in terra predicta in forma predicta." For an abstract of this document, see *Cal. Docs. rel. to Ireland, 1252-1284*, 195.

[117] *Parl. Writs*, I, 1. "Et Lucam de Lukka et socios suos mercatores de Lukka et Bonasium Bonahuty et socios suos mercatores de Florencia quos ad dictam consuetudinem in terra predicta colligendam et capiendam deputavimus admittatis, et sibi in omnibus, tam scilicet super ordinatione sigillorum nostrorum que ad hoc fieri fecimus et vobis transmittimus, quam super aliis que dictum negotium contingunt consulentes sitis et auxiliantes prout iidem mercatores vobis scire facient ex parte nostra." For an abstract of this document, see *Cal. Docs. rel. to Ireland, 1252-1284*, 195.

[118] *Parl. Writs*, I, 2. "Rex Omnibus Ballivis, etc., de terra sua Hiberniae ad quos, etc., salutem. Sciatis quod assignavimus Lucam de Lukka et socios suos mercatores de Lukka et Bonausium Bonauti et socios suos mercatores Florentinos Custodes et Ballivos nostros ad percipiendam ad opus nostrum dimidiam marcam de quolibet sacco lanae et dimidiam marcam de singulis trescentis pellibus lanutis que faciunt unum saccum et unam marcam de qualibet lesta coriorum exeuntibus terram nostram Hiberniae et ad ea facienda que contingunt negotium supradictum quamdiu nobis placuerit. Ita quod nobis inde respondeant ad Scaccarium nostrum Dublinae. Et ideo vobis mandamus quod eisdem mercatoribus in hiis que dictum negotium contingunt consulentes sitis et auxiliantes quotiens iidem mercatores vobis scire facient ex parte nostra. In cujus, etc. Teste ut supra" [*i.e.*, teste Rege].

[119] *Cal. Docs. rel. to Ireland, 1252-1284*, 234.

[120] *Ibid.*, 243.

[121] *Ibid., 1285-1292*, 9, 25, 58, 61, 72, 132; *ibid., 1293-1301*, 14, 23, 29, 37, 97, 98, 99, 117, 120, 127, 128, 132, 138, 139, 140, 141, 151, 152, 155, 160, 181, 189, 190, 191, 192, 213, 248, 250, 251, 281, 293, 295, 296, 297, 305, 307, 314, 351, 376.

[122] *Ibid., 1293-1301*, 266-67.

[123] *Ibid., 1293-1301*, 300-01, 361; *ibid., 1302-1307*, 68, 101.

[124] On the petitions that came before the Lenten parliament of 1305, see Maitland, Introduction to *Memoranda de Parliamento*, lv-lxxv.

[125] On the nature of early parliaments, see Maitland, Introduction to *Memoranda de Parliamento;* McIlwain, *The High Court of Parliament*; Pollard, *The Evolution of Parliament*, chaps. ii-vi; J. F. Baldwin, *The King's Council in England during the Middle Ages*, chap. xii; D. Pasquet, *An Essay on the Origins of the House of*

Commons (trans. by R. G. D. Laffan); G. B. Adams, *Council and Courts in Anglo-Norman England*, chap. x.

126 Pollard, *op. cit.*, 20.

127 Introduction to *Memoranda de Parliamento*, lxxxiii-lxxxiv.

128 *Ibid.*, lxvii.

129 *Ibid.*, xxxvi; Pollard, *op. cit.*, 33-34; Pasquet, *op. cit.*, 94, 130, 132-34; Adams, *op. cit.*, 309-13.

130 Introduction to *Memoranda de Parliamento*, lxxxii.

131 *Pollard, op. cit.*, chap. xiv.

132 *Ibid.*, 279.

133 *France and England*, 70-71.

134 *Ibid.*, 71.

135 Tout, *Chapters in the Administrative History of Mediaeval England*, II, 149.

136 *Ibid.*, II, 150, note.

137 Pasquet, *op. cit.*, chaps. iii and iv.

138 Introduction to *Memoranda de Parliamento*, xxxvi; Pasquet, *op. cit.*, 94, 117; Pollard, *op. cit.*, 33-34.

139 *Fleta* (ed. of 1647), Lib. II, cap. 2. "Habet enim Rex curiam suam in consilio suo, in Parliamentis suis, praesentibus praelatis, comitibus, baronibus, proceribus, & aliis viris peritis, ubi terminatae sunt dubitationes judiciorum, & novis injuriis emersis nova constituuntur remedia, & unicuique justitia, prout meruit, retribuetur ibidem."

140 Adams, *Council and Courts in Anglo-Norman England*, 302.

141 See, e.g., *Patent Rolls of the Reign of Henry III, 1216-1225*, 298-99, 497-98. In 1237 the council provided that changes should be made in certain legal writs, and the King commanded the justiciar, magnates and free tenants of Ireland to observe "the said provision." *Calendar of the Patent Rolls, 1232-1247*, 176-77.

Chapter II

1 John Nalson, *An Impartial Collection of the Great Affairs of State, from the Beginning of the Scotch Rebellion in the Year MDCXXXIX to the Murther of King Charles I* (London, 1683), II, 12.

2 *The Journals of the House of Commons of the Kingdom of Ireland*, I, 174-75.

3 *Ibid.*, 215. The answers of the judges are given in Nalson, *op. cit.*, 575 *et seq.*

[4] *The Journals of the House of Commons of the Kingdom of Ireland*, I, 223.

[5] *An Argument delivered by Patricke Darcy, Esquire; by the express order of the House of Commons in the Parliament of Ireland, 9 Iunii, 1641.* This was printed at Waterford in 1643 by Thomas Bourke, printer to the Confederate Catholics of Ireland. I have used a reprint, published in Dublin in 1764, a copy of which is in the Library of Yale University. Besides "Mr. Darcies Reply to the Answer of the Judges," this contains the questions submitted to the judges, a speech delivered by a member of the Irish House of Commons upon presenting the questions in the House of Lords, the answer of the judges, and the declarations of the law upon the questions by the Commons.

[6] *Ibid.*, 70.

[7] *The Journals of the House of Commons of the Kingdom of Ireland*, I, 269.

[8] 10 Hen. 7, c. 4 (Irish).

[9] Bellings's narrative, based upon two contemporary manuscripts, was published some forty years ago in a work entitled *History of the Irish Confederation and the War in Ireland. . . . By Richard Bellings. . . . With Correspondence and Documents of the Confederation and of the Administrators of the English Government in Ireland, Contemporary Personal Statements, Memoirs etc.*, ed. by John T. Gilbert (7 vols., Dublin, 1882-91). In these volumes the editor brought together a mass of documentary matter essential for a study of the Catholic Confederation, of which little was known previously. The work will be cited hereinafter as Bellings.

[10] *The Journals of the House of Commons*, II, 330; Robert Dunlop, *Ireland under the Commonwealth*, I, cxx.

[11] *History of England from the Accession of James I to the Outbreak of the Civil War* (new ed., London, 1899), X, 173.

[12] 16 Car. 1, c. 33. The money subscribed was all to be used for the suppression of the Irish Rebellion, but as a matter of fact some of it was spent to finance the Puritan Rebellion against the King in England. See Richard Bagwell, *Ireland under the Stuarts and during the Interregnum*, II, 36.

[13] Bellings, *op. cit.*, I, 261.

[14] See above, p. 3.

[15] Historical Manuscripts Commission, *Calendar of the Manuscripts of the Marquess of Ormonde*, new series, II, 90.

[16] Bellings, *op. cit.*, II, 47.

[17] Gardiner, *History of the Great Civil War* (new ed., London, 1893), I, 113.

[18] For the work of the Assembly, see Bellings, *op. cit.*, II, 73 *et seq.* For a brief account, see Bagwell, *op. cit.*, II, 25 *et seq.*

[19] Bellings, *op. cit.*, II, 84-85.

[20] *Ibid.*, I, iii.

[21] Reprinted in Bellings, *op. cit.*, III, 336-39.

[22] This was printed at Waterford a few months later and may be found in Rushworth, *Historical Collections*, Part III, vol. I, 385 (should be 417) *et seq.*, and in Bellings, *op. cit.*, II, 226 *et seq.* The King wished to come to terms with the Irish Catholics so that his forces in Ireland might be available for use against the Roundheads in England. Gardiner, *History of the Great Civil War*, I, 120.

[23] Bellings, *op. cit.*, II, 141-43; see also Thomas Carte, *The Life of James, Duke of Ormonde* (new ed., Oxford, 1851), II, 441-42.

[24] *I.e.*, the Puritan party. The Kilkenny Assembly had decreed that the enemy should not be called "English" or "Protestants," but "the Puritanical or malignant party." Bellings, *op. cit.*, II, 84.

[25] Rushworth, *op. cit.*, Part III, vol. I, 388 (should be 420) *et seq.*

[26] Bellings, *op. cit.*, II, 295.

[27] *Ibid.*, III, 208-10, 273-75; V, 72-75, 286-308; VI, 177-78; VII, 184-211.

[28] They are printed in Bellings, *op. cit.*, III, 128-33, and endorsed "Irish Agents' Propositions, March the 28, 1644."

[29] In another of the Propositions, which was not included in the revised draft, the demand was made that the Confiscation Act "and all other Acts and ordinances made in the Parliament of England in prejudice of the sayd Catholiques" should be declared void.

[30] Bellings, *op. cit.*, III, 177.

[31] *Ibid.*, III, 278 *et seq.*

[32] *Ibid.*, III, 310-11.

[33] *Ibid.*, IV, 247; V, 97.

[34] *Ibid.*, VII, 194. Milton denounced the agreement between Ormonde and the Irish Confederates for the numerous concessions that it made to the "inhuman Rebels and Papists of Ireland" and said that it granted to the latter, among other things, that the Irish Parliament should be no more dependent on the Parliament of England than the Irish themselves should declare to be agreeable to the

laws of Ireland. See his *Observations on the Articles of Peace*, in *The Works of John Milton*, ed. by the Rev. John Mitford, IV, 557.

[35] *The Journals of the House of Commons of the Kingdom of Ireland*, I, 323, 326, 327, 328; Harris, *Hibernica* (Dublin, 1770), Part II, Preface, 5-6 and 47-48.

[36] *Serjeant Mayart's Answer to a Book intitled, A Declaration setting forth how, and by what means, the Laws and Statutes of England, from time to time, came to be of Force in Ireland.* For Mayart's career, see F. Elrington Ball, *The Judges in Ireland, 1221-1921*, I, 332.

[37] My references to this publication are to a later edition, published in 1770.

[38] *Hibernica*, Part II, Preface, 3-4. So far as is known, Darcy consistently denied the right of the English Parliament to make laws for Ireland. It seems doubtful whether the same can be said of Bolton. In an edition of the Irish statutes published by him in 1621 it is stated in a marginal note to the statute 10 Henry 7, c. 22, that an act had been passed by the Irish Parliament in the tenth year of Henry IV and another in the twenty-ninth of Henry VI to the effect that English statutes should not be of force in Ireland unless allowed and published in that kingdom by the Parliament of Ireland. (See William Molyneux, *The Case of Ireland being bound by Acts of Parliament in England, stated*, ed. of 1773, pp. 39-40). This might suggest that in 1621 Bolton held the doctrine of the legislative independence of Ireland. However, on March 31, 1642, he put his signature to a letter sent by the Lords Justices and Council of Ireland to the Lord Lieutenant, in which these words occur: "And considering that the Parliament of England have with great wisdom interposed towards the deliverance of this kingdom . . . . and that it is therefore necessary that we so order our counsels in that great work as our proceedings may consist with their purposes and resolutions for His Majesty and this kingdom . . . . we have now directed our letters to the Speaker of the honourable Commons' House of Parliament there . . . . and we hope to be directed from that side how to govern our proceedings in a matter of so high concernment." *Ormonde MSS.*, new series, II, 103-4. We have seen that in 1644, the year in which the *Declaration* made its appearance, Bolton was at one with the Catholic Confederates in opposing the claims of the English Parliament.

[39] J. T. Ball *Historical Review of the Legislative Systems operative in Ireland* (new ed.), chap. v.

[40] C. H. McIlwain, *The American Revolution*, 33 *et seq.*

[41] *Hibernica*, Part II, 14-15.

[42] 10 Hen. 7, c. 22 (Irish).

[43] Ball, *op. cit.*, 31.

[44] *Hibernica*, Part II, 23.

[45] *Ibid.*, 23.

[46] *Ibid.*, 15, 18.

[47] The *Statutum Hiberniae* of Henry III he regarded as merely explanatory of common law. *Hibernica*, Part II, 25-27. Of the *Ordinatio de Statu Terrae Hiberniae*, of 17 Edward II (1323), which he erroneously assigned to the reign of Edward I, he said that it was "never received in Ireland" and, moreover, that it was not an Act of Parliament but only an ordinance of the King in Council, "and therefore could not have the force of law." *Ibid.*, 28. For these documents see *Statutes and Ordinances, and Acts of the Parliament of Ireland, King John to Henry V*, ed. by Henry F. Berry (Dublin, 1907), 21, 293.

[48] *Hibernica*, Part II, 30.

[49] *Ibid.*, 15.

[50] *Ibid.*, 77, 177.

[51] *Magna Carta Commemoration Essays*, 140-41, 145.

[52] *The American Revolution*, 63, 73.

[53] Part I, chap. iv. For further dissent from Mr. McIlwain's opinion, see W. S. Holdsworth, *Sources and Literature of English Law*, 39-45.

[54] The late George Burton Adams was of the opinion that the same was true of the thirteenth century. See his *Council and Courts in Anglo-Norman England*, 321-24. Sir Matthew Hale in his *History of the Common Law of England* (ed. of 1820, p. 9) says of the statutes of Henry III, Edward I and Edward II that many of them were made in affirmance of the common law and that others altered the common law, but the latter, he adds, "are yet so ancient, that they now seem to have been, as it were, a part of the common law."

[55] *Hibernica*, Part II, 25.

[56] *Ibid.*, 15.

[57] *Ibid.*, 172.

[58] *Ibid.*, 81 *et seq.*

[59] *Ibid.*, 138.

[60] *The Statutes of the Realm*, I, xlv.

[61] *Statutes and Ordinances, and Acts of the Parliament of Ireland, King John to Henry V*, xiv.

[62] *Ibid.*, 47 *et seq.* For other examples of the same procedure, in the reigns of Edward III and Richard II, see *ibid.*, 323 *et seq.* and 493 *et seq.* Not all medieval English statutes, of course, applied to Ireland, but the point is that some of them were made binding in Ireland without any action by the Irish Parliament. Miss M. V. Clarke, in a paper on "Irish Parliaments in the Reign of Edward II," refers to the transmission of English statutes to Ireland as evidence that the Irish Parliament was in no sense a sovereign body. *Transactions of the Royal Historical Society*, 4th series, IX, 46-47.

[63] *The Statutes of the Realm*, I, 179. See above, p. 29.

[64] This needs to be emphasized in view of the enthusiastic exploitation of the *Declaration* by Professor McIlwain in his essay, *The American Revolution*, in which he hails it as "the first exposition of the American constitutional doctrine on parliamentary authority outside the realm." Mr. McIlwain's main thesis is that the precedents, on the whole, sustain the radical American colonial contention that the British Parliament had no lawful authority over the colonies, and to establish it he relies much upon what he calls the "Irish parallel." My conclusion is that the precedents, on the whole, do *not* support the Irish-American claim, but, on the contrary, sustain the British doctrine of parliamentary supremacy.

[65] *Hibernica*, Part II, 188.

[66] *Ibid.*, 136. An Irish statute of 1460 (38 Hen. 6, c. 6), which was probably unknown to our authors, reads as follows: "Also, at the request of the Commons: That whereas the land of Ireland is and at all times has been corporate of itself, by the ancient laws and customs used in the same, freed of the burthen of any special law of the realm of England, save only such laws as by the lords spiritual and temporal and the commons of the said land had been in Great Council or Parliament there held, admitted, accepted, affirmed and proclaimed, according to sundry ancient statutes thereof made." *Statute Rolls of the Parliament of Ireland, Reign of King Henry the Sixth*, ed. by Henry F. Berry, (Dublin, 1910), 645. This assertion of Irish legislative independence would have pleased the author of the *Declaration* had he known of it, but it would not greatly have disconcerted Mayart, since the Lord Lieutenant who summoned the Irish Parliament of 1460, Richard Duke of York, had been pro-

claimed a rebel in England, and a later Irish statute (10 Hen. 7, c. 3) declared the Act of 1460 void.

[67] Year Book, 20 Hen. 6, f. 8. Portington seems to be anticipating the argument of the American colonial Whigs, that taxation without representation is unconstitutional, while Fortescue foreshadows the more radical doctrine that the authority of Parliament is confined to the realm of England. See McIlwain, *op. cit., passim*, for what he calls the "realm-and-dominions" argument and the "fundamental law" argument as advanced by the American colonists against the claims of Parliament.

[68] *Hibernica*, Part II, 17. Sir John Fortescue was appointed Chief Justice of the King's Bench in 1442, and Portington was appointed a Justice of the Common Pleas in 1443; they had previously been serjeants. Edward Foss, *The Judges of England*, IV, 310, 354; Fortescue, *The Governance of England*, ed. by Plummer, 45-46. The mistake made by the author in assuming that they were delivering judicial opinions in *Pilkington's Case* has had a long if not a useful career; see Mayart's *Answer* (*Hibernica*, Part II, 142-43); Molyneux, *op. cit.*, 76-77; Ball, *op. cit.*, 28.

[69] 2 Hen. 6, c. 4.

[70] Year Book, 2 Rich. 3, f. 11-12.

[71] Year Book, 1 Hen. 7, f. 3.

[72] *Hibernica*, Part II, 29.

[73] Page 57.

[74] Coke, *Reports* (London, 1826), IV, 30-31. In *The Case of Ireland*, cited above, Molyneux refers to the right of appeal from the Irish to the English King's Bench as one of the arguments (he considers it an unsound one) to prove the supremacy of the English over the Irish Parliament. This, he says, seems to have been "the great thing that induced my lord *Cook* to believe that an act of parliament in *England*, and mentioning or including *Ireland*, should bind here. The subordination of *Ireland* to *England* he seems to infer from the subordination of the *King's-bench* of *Ireland* to the *King's-bench* of *England.*"

[75] Coke, *Reports*, IV, 39.

[76] *Hibernica*, Part II, 30.

[77] *Ibid.*, 33.

[78] *Hibernica*, Part II, 142-43.

[79] *Ibid.*, 158-59. The text of the passage in question runs as follows (Brooke's *Abridgment*, ed. of 1586, Part II, f. 119): "Vide

titulo Action sur lestatute in Fitz. 6. per loppinion del chiefe Justice que les statutes Dengliterre liera ceux de Irelande que fuit in maner agree per les auters Justices & uncore il fuit deny le darren iour deuant, tamen nota que Irelande est un realme de luy mesme & ad parliament in luy mesme." Mayart took this to mean that "though *Ireland* be a Realm of itself, and hath a Parliament in itself, and though it had been denied before, yet the opinion of the Chief Justice, and the other Judges, when they had more seriously studied, and conferred on that case, was, in a manner, that *Ireland* was bound by the statutes of *England.*"

[80] *Hibernica,* Part II, 148-49, 179-80.

[81] *Ibid.,* 9-10, 38-41.

[82] *Hibernica,* Part II, 49 *et seq.* According to Roger of Hoveden, Henry II made John "King in Ireland" in 1177. See *Chronica Magistri Rogeri de Houedene,* ed. by Stubbs, Rolls Series, II, 133. In the documents relating to Ireland in the Public Record Office in London there is nothing to show that such a grant was made or that Henry divested himself of authority over Ireland. See *Calendar of Documents relating to Ireland, preserved in Her Majesty's Public Record Office, London, 1171-1251,* ed. by H. S. Sweetman, 1-13, covering the reign of Henry II. Henry undoubtedly made a grant of some sort to John, for the latter, as Earl of Morton, issued charters for lands in Ireland before his accession to the English throne. See *ibid.,* index, under "John: Earl of Morton." Even if John was made King in Ireland by his father, it would by no means imply that he was an independent sovereign. There are many instances in the Middle Ages of subordinate kings. For example, Henry II, during his own lifetime, had his eldest son crowned king, but it is certain that he did not intend to make him an independent ruler.

[83] *Hibernica,* Part II, 59 *et seq.* In 1254 Henry III granted to Edward, in fee tail, all of Ireland, with the exception of a few specified territories, but the homage and fealty which the magnates and free tenants of Ireland were to render to the Prince were to be saving their allegiance to the King, and Edward and his heirs were to hold Ireland so that it should not be separated from the Crown of England. When Edward, without license from his father, alienated crown lands in Ireland, Henry directed that such alienations should be revoked. *Cal. Docs. rel. to Ireland 1252-1284,* ed. by Sweetman, nos. 346, 405, 844.

[84] *Hibernica,* Part II, 202-21. It is worth noting that in the course

of his opinion in the famous case of Campbell *v.* Hall (1774), Lord Mansfield, C. J., said: "The alteration of the laws of Ireland has been much discussed by lawyers and writers of great fame at different periods of time. . . . . The fact, in truth, after all the researches that have been made, comes out clearly to be as laid down by Lord Chief Justice Vaughan, that Ireland received the laws of England by the charters and commands of Henry II, King John, Henry III, and he adds an *et cetera* to take in Edward I, and the successors of the princes named." King John issued a charter "concerning the observance of the laws and customs of England in Ireland" (*Statutes and Ordinances, and Acts of the Parliament of Ireland, King John to Henry V,* ed. by Berry, 23), but this does not prove that English law had not been introduced into Ireland before his reign.

[85] *Hibernica,* Part II, 223-24. It is a fact, however, that no records relating to Ireland, except a few entries in pipe rolls concerning a scutage levied by Henry II in connection with an expedition to Ireland, are found in the English public records for the reign of Richard. *Cal. Docs. rel. to Ireland, 1171-1251,* xiii.

[86] *Hibernica,* Part II, 30-33. The claim that legislation without representation is contrary to natural law and unconstitutional, though it played but a subordinate part in the author's argument, was to have a prosperous future, both in Ireland and in the American colonies.

[87] It should be clear from the foregoing analysis of the *Declaration* that the author's denial of the legislative authority of the English Parliament over Ireland was not based upon the revolutionary character of the existing English Parliament. He was arguing from the past and for the future.

[88] *Hibernica,* Part II, 195-97. On the nature of representation in the medieval English Parliament, see a suggestive note by Professor Pollard in his *Factors in American History,* 49.

[89] *Hibernica,* Part II, 193.

[90] *The Journals of the House of Commons of the Kingdom of Ireland,* I, 327.

[91] 13 Car. 2, c. 1 (Irish). See *The Statutes at Large, passed in the Parliaments held in Ireland from the Third Year of Edward the Second, A.D. 1310, to the Twenty-Sixth Year of George the Third, A.D. 1786* (Dublin, 1786), II, 226-28.

[92] 12 Car. 2, c. 18, s. 19.

[93] 12 Car. 2, c. 32.

[94] 14 Car. 2, c. 18.

[95] 12 Car. 2, c. 34.

[96] 15 Car. 2, c. 7, s. 15.

[97] 1 Gul. & Mar., sess. 2, c. 2.

[98] 4 W. & M., c. 1 (Irish).

[99] The reign of the new sovereigns in Ireland was reckoned in Irish law as beginning on February 13, 1688 (o.s.), the day on which they accepted the Crown of England.

[100] The text of this act can be found in Thomas Davis, *The Patriot Parliament of 1689*, ed. with an Introduction by Sir Charles Gavan Duffy, chap. iv.

[101] Accounts of the Irish Parliament of 1689, written from opposite points of view, can be found in Thomas Davis, *The Patriot Parliament of 1689* and T. Dunbar Ingram, *Two Chapters of Irish History.*

[102] 1 Gul. & Mar., sess. 2, c. 9.

[103] 7 Wil. 3, c. 3 (Irish).

[104] *The Case of Ireland being bound by Acts of Parliament in England, stated* (ed. of 1773), 67-68.

[105] 1 Gul. & Mar., sess. 1, c. 29.

[106] 1 Gul. & Mar., sess. 1, c. 34.

[107] 17 & 18 Car. 2, c. 10 (Irish).

[108] 2 Eliz., c. 1 (Irish).

[109] 3 Gul. & Mar., c. 2.

[110] *The Journals of the House of Commons of the Kingdom of Ireland*, II, 9.

[111] See, however, Richard Mant, *History of the Church of Ireland from the Revolution to the Union*, 100, for evidence that some of this legislation aroused constitutional objection in Ireland.

[112] 10 Gul. 3, c. 16.

[113] Lecky, for example, commends Molyneux's "strong historical arguments" (*History of Ireland in the Eighteenth Century*, new ed., I, 443), and Professor McIlwain offers no adverse criticism of them (*The American Revolution*, 45). Mr. Alfred Zimmern asserts that Molyneux handled his case "with great knowledge, skill, and moderation" (*Henry Grattan*, 15).

[114] *The Case of Ireland*, 29, 32-33, 70, 93. For Molyneux's political theory, see Josiah Tucker, *A Treatise concerning Civil Government* (London, 1781), 11-13.

[115] *The Case of Ireland*, 64-65.

[116] *Ibid.*, 69.

[117] *Ibid.*, 84-85.

[118] *Ibid.*, 85-86.

[119] *Journals of the House of Commons*, XII, 281, 324, 331, 336-37; Cobbett's *Parliamentary History of England*, V, 1181-82.

[120] *History of England*, ed. by Charles Harding Firth, VI, 2775.

[121] Other controversial writings by Atwood were *The Fundamental Constitution of the English Government, proving King William and Queen Mary our Lawful and Rightful King and Queen* (London, 1690), and *The Superiority and Direct Dominion of the Imperial Crown of England, over the Crown and Kingdom of Scotland* (London, 1704). In the latter he argued at great length to show that Scotland had from earliest times been dependent upon the Crown of England and that it remained so even after its King, James VI, came to the throne of England. Scottish patriots were naturally indignant, and it is not strange that the Scottish Parliament ordered the work to be burned by the common hangman. In 1701 Atwood became Chief Justice of New York.

[122] *The History, and Reasons*, 88-91, 115, 157-59, 161.

[123] Molyneux, *op. cit.*, 26-27, 78-79.

[124] Atwood, *op. cit.*, 81.

[125] *Ibid.*, 78-79. Atwood referred specifically to acts regulating the succession passed in 1406 and 1485.

[126] P. 95.

[127] For later adverse criticism of Molyneux's arguments, see Josiah Tucker, *Tract V, The Respective Pleas and Arguments of the Mother Country, and of the Colonies, distinctly set forth* (Gloucester, 1775). Tucker was comparing the claims of the American colonists to be independent of Parliament with those advanced by Molyneux for the independence of Ireland, and contended that the latter, though seemingly more plausible than the former, were wholly unwarranted.

[128] *The Jurisdiction of the Lords House, or Parliament*, ed. by Francis Hargrave (London, 1796), 124.

[129] E.g., Molyneux, *op. cit.*, 77-78, and Lord Mountmorres, *An Historical Dissertation upon the Origin, Suspension, and Revival, of the Jurisdiction and Independency of the Irish Parliament* (London, 1795), 9-10.

[130] *Brief Animadversions on .... the Fourth Part of the Institutes of the Laws of England* (London, 1669), 313-14.

131 The proceedings in the English House of Lords in Annesley *v.* Sherlock can be followed in *Journals of the House of Lords,* XX, 449, 481-84, 491, 495, 574, 593; XXI, 39-40, 41, 55, 178-79, 214.

132 6 Geo. 1, c. 5.

133 According to Lord Mountmorres (*op. cit.,* 17), thirty-eight appeals are recorded in the Irish Lords Journals from 1644 to 1719.

134 "The Drapier's Letters" are published in vol. VI of *The Prose Works of Jonathan Swift,* ed. by Temple Scott.

135 *History of Ireland in the Eighteenth Century,* (new ed.), I, 454.

136 See Address XIX, in Lucas, *The Political Constitutions of Great Britain and Ireland, Asserted and Vindicated,* (2 vols., London, 1751), II, 331-54, and the "Dedication" in *Magna Charta Libertatum Civitatis Dublini* (Dublin, 1749), xi-xxi.

137 *The Journals of the House of Commons of the Kingdom of Ireland,* V, 14.

138 The best account of the Irish House of Commons is to be found in Edward Porritt, *The Unreformed House of Commons,* vol. II.

139 The story is well told by Porritt, *op. cit.,* II, chap. liv.

140 21 & 22 Geo. 3, c. 47 (Irish).

141 *The Speeches of the Right Honourable Henry Grattan, in the Irish, and in the Imperial Parliament,* ed. by his son (4 vols., London, 1822), I, 53. For Grattan's speech in introducing the resolution, see *ibid.,* 38 *et seq.*

142 Francis Hardy, *Memoirs of the Political and Private Life of James Caulfield, Earl of Charlemont* (London, 1810), 212; Ball, *op. cit.,* 129.

143 Irish Commons Journals, X, 306-7; Grattan, Speeches, 118-19.

144 Grattan, Speeches, I, 104 *et seq.*

145 *The Parliamentary Register: or, History of the Proceedings and Debates of the House of Commons of Ireland,* (2d ed., Dublin, 1784), I, 277.

146 Irish Commons Journals, X, 334-35. *The Parliamentary History of England* (Hansard), XXIII, 17-20.

147 *The Annual Register,* 1783, pp. 146-47.

148 *Parl. Hist.,* XXIII, 16-48. The act is 22 Geo. 3, c. 53.

149 *Parl. Hist.,* XXIII, 323. Irish Commons Journals, X, 378.

150 For Flood's speeches concerning the repeal of the Declaratory Act, see *Parl. Reg.* (Ireland), I, 406-15 421-29, or Grattan, Speeches, I, appendices I and II.

151 21 & 22 Geo. 3, c. 48 (Irish). This became law on July 27, 1782.

[152] *Parl. Hist.*, XXIII, 147-52.

[153] 21 & 22 Geo. 3, c. 49 (Irish).

[154] *Parl. Hist.*, XXIII, 327-28.

[155] *Ibid.*, XXIII, 333. See also *Memorials and Correspondence of Charles James Fox*, ed. by Lord John Russell (London, 1853), I, 418 *et seq.*

[156] 23 Geo. 3, c. 28.

Chapter III

[1] Recent scholarly accounts of the proprietary period in the history of Barbados can be found in James A. Williamson, *The Caribbee Islands under the Proprietary Patents*, and Vincent T. Harlow, *A History of Barbados, 1625-1685*, both published in 1926.

[2] Williamson, *op. cit.*, 158.

[3] Harlow, *op. cit.*, 338.

[4] *A Century of Population Growth* (Bureau of the Census, Washington, 1909), 9.

[5] Williamson, *op. cit.*, 157-59.

[6] Firth and Rait, *op. cit.*, I, 331.

[7] Williamson, *op. cit.*, 115.

[8] *Journals of the House of Lords*, IX, 51; Harlow, *op. cit.*, 30-31.

[9] Harlow, *op. cit.*, 29.

[10] Williamson, *op. cit.*, 120 *et seq.*

[11] Nicholas Foster, *A Briefe Relation of the late Horrid Rebellion acted in the Island Barbadas in the West-Indies* (London, 1650), 4.

[12] *Calendar of State Papers, Colonial Series, 1574-1660*, 330. Similar letters were sent to all the other colonies.

[13] Foster, *op. cit.*, 24.

[14] *Cal. St. Pap., Col., 1574-1660*, 346.

[15] Firth and Rait, *op. cit.*, I, 1263.

[16] Contemporary narratives of the rising of the Barbadian royalists in 1650 are given in Foster's tract referred to above, and in *A Brief Relation of the Beginning and Ending of the Troubles of Barbados*, by A. B. (London, 1653). Both of these writers were anti-royalists. The best modern accounts are to be found in N. Darnell Davis, *The Cavaliers & Roundheads of Barbados, 1650-1652* (Georgetown, British Guiana, 1887); Williamson, *op. cit.*, 164 *et seq.*; and Harlow, *op. cit.*, 45 *et seq.*

[17] *Cal. St. Pap., Col., 1574-1660*, 342.

[18] Firth and Rait, *op. cit.*, II, 425 *et seq.*

[19] This act was not restricted in scope to the rebellious colonies, for it forbade foreign ships to trade with *any* of the English colonies in America except by special license. The significance of this enactment in the history of English colonial policy is pointed out by H. L. Osgood, *The American Colonies in the Seventeenth Century*, III, 205, and by George Louis Beer, *Origins of the British Colonial System*, 383-87.

[20] *Cal. St. Pap., Col., 1574-1660*, 344; Sir Robert H. Schomburgk, *The History of Barbados*, 271.

[21] Davis, *op. cit.*, 197-200; Schomburgk, *op. cit.*, 706-08.

[22] *Cal. St. Pap., Col., 1574-1660*, 347, 349, 350.

[23] *Ibid.*, 362, 364.

[24] *Ibid.*, 365-70, 374-75; Williamson, *op. cit.*, 176.

[25] *Cal. St. Pap., Col., 1574-1660*, 375.

[26] Printed in Davis, *op. cit.*, 250-55, and in Schomburgk, *op. cit.*, 280-83.

[27] *Op. cit.*, 176.

[28] *Acts and Statutes of Barbados* (1654); see Williamson, *op. cit.*, 176-77, notes.

[29] *Cal. St. Pap., Col., 1574-1660*, 375.

[30] *Ibid.*, 380.

[31] *Ibid.*, 483.

[32] *Ibid.*, 380.

[33] *Ibid.*, 406.

[34] *Ibid.*, 384.

[35] *Ibid.*, 384.

[36] *Ibid.*, 399.

[37] *Ibid.*, 408.

[38] *Ibid.*, 373; Alfred Leroy Burt, *Imperial Architects*, 15.

[39] Harlow, *op. cit.*, 98.

[40] *Cal. St. Pap., Col., 1574-1660*, 377, 388.

[41] Harlow, *op., cit.*, 99.

[42] *The Groans of the Plantations*, 23-24.

Chapter IV

[1] *Introduction to the Study of the Law of the Constitution*, (8th ed.), xxv-xxvi. "The legislative supremacy of Parliament," says Sir Henry Jenkyns in his *British Rule and Jurisdiction beyond the Seas*, 10, "over the whole of the British dominions is complete and un-

doubted in law, though for constitutional or practical reasons, Parliament abstains from exercising that supreme legislative power." However extensive the authority of a colonial legislature may be, its enactments may legally be over-ridden by an Act of Parliament; this was expressly declared in the Colonial Laws Validity Act of 1865, 28 & 29 Vict., c. 63.

[2] See above, chap. v.

[3] Imperial Conference, 1926, *Summary of Proceedings*, Cmd. 2768, p. 14.

[4] The distinction between the Canadian and American meaning of "unconstitutional" is thus expressed by Mr. Justice W. R. Riddell (*The Canadian Constitution in Form and in Fact*, 1-2): "In Canada anything unconstitutional is wrong, however legal it may be; in the United States anything unconstitutional is illegal, however right and even advisable it may be; in the United States anything unconstitutional is illegal, in Canada to say that a measure is unconstitutional rather suggests that it is legal but inadvisable."

[5] 47 Geo. 3, sess. 1, c. 36. A good general account of the agitation against the slave trade is given by Frank J. Klingberg in *The Anti-Slavery Movement in England.*

[6] Thomas Clarkson, *The History of the Rise, Progress, and Accomplishment of the Abolition of the African Slave-Trade by the British Parliament* (London, 1808), I, 282 *et seq.*

[7] Clarkson, *op. cit.*, I, 286-87.

[8] 51 Geo. 3, c. 23.

[9] 31 Geo. 3, c. 55.

[10] Robert Thorpe, *A Letter to William Wilberforce, Esq., M. P.* (London, 1815), 2.

[11] C. P. Lucas, *A Historical Geography of the British Colonies*, (2d ed., Oxford, 1900), III, 184 *et seq.*

[12] He was the only member of the royal family who had opposed the slave trade. *Edinburgh Review*, XXI, 470-71.

[13] Thorpe, *op. cit.*, 29-30. It was later both asserted and denied that the African Institution was virtually a continuation of the Sierra Leone Company; Thorpe, *op. cit.*, 6-8; Gilbert Mathison, *A Short Review of the Reports of the African Institution* (London, 1816), 14-16; *Special Report of the Directors of the African Institution . . . . respecting the Allegations contained in a Pamphlet entitled "A Letter to William Wilberforce . . . . by R. Thorpe, Esq."* (London, 1815).

[14] *Report of the Committee of the African Institution read to the*

General Meeting on the 15th July, 1807, together with the Rules and Regulations which were then adopted for the Government of the Society (London, 1807), 68-71.

[15] *Ibid.*, 68-69.

[16] This is evident from the annual reports of the directors, e.g., *Eighth Report* (1814), 10. James Stephen, M.P., an ardent abolitionist and a brother-in-law of Wilberforce, was a director of the Institution, as was his son, James Stephen, Jr. (afterwards Sir James Stephen of Colonial Office fame). The latter was a member of a committee appointed by the African Institution to procure information from the Colonial Office regarding the slave laws of the colonies, and in this way he became acquainted with the Colonial Secretary, Lord Bathurst, who appointed him counsel to the Colonial Office in 1813. Spokesmen for the West India interests objected to this appointment on the ground that it gave the abolitionists access to Colonial Office papers. *The Speech of James Stephen, Esq., at the Annual Meeting of the African Institution . . . . on the 26th March, 1817* (London, 1817), 34 *et seq.*; Caroline Emelia Stephen, *The Right Honourable Sir James Stephen* (printed for private circulation, 1906), 3.

[17] *Edinburgh Review*, XV, 485 *et. seq.*; XVI, 430 *et seq.*; XVIII, 305 *et seq.*; XX, 58 *et seq.*; XXI, 462 *et seq.*

[18] *Memoirs of the Life of Sir Samuel Romilly*, written by himself, ed. by his sons (2d. ed., London, 1840), III, 1; *The Life of William Wilberforce*, by his sons (London, 1838), IV, 3.

[19] Dated March 26, 1812, and proclaimed in the colony in the following August; Trinidad, Minutes of Council, Aug. 31, 1812, Public Record Office, Colonial Office Records, 298:5. Hereinafter the abbreviation C. O. will be used in referring to the Colonial Office Records. The Trinidad order is printed in *Seventh Report of the Directors of the African Institution* (London, 1813), 45 *et seq.* A similar order in council in 1814 established a slave registry in St. Lucia; *Parliamentary Papers*, sess. 1814-1815, H. C. 458, pp. 34-35. The Crown had the right to legislate for colonies acquired by conquest or cession and to which representative assemblies had not been granted, like Trinidad and St. Lucia, but not for colonies acquired by settlement, nor for those acquired by conquest or cession after such assemblies had been granted. A. B. Keith, *Responsible Government in the Dominions*, I, 1-3.

[20] *The Life of William Wilberforce*, IV, 20.

[21] *Reasons for establishing a Registry of Slaves in the British Colonies* (London, 1815), 80-91.

[22] *Reasons for establishing a Registry of Slaves in the British Colonies, being a Report of a Committee of the African Institution* (London, 1815).

[23] XXV, 315 *et. seq.; The Life and Times of Henry Lord Brougham*, II, 222.

[24] Minutes of the Standing Committee of West India Planters and Merchants (MS.), IV, 347.

[25] *Parliamentary Debates*, XXXI, 772, 784-85; *Memoirs of the Life of Sir Samuel Romilly*, 2d. ed., III, 181.

[26] *Parl. Deb.*, XXXI, 1133. The bill is printed in *Parl. Papers*, sess. 1814-1815, H. C. 458.

[27] *A Review of the Colonial Slave Registration Acts, in a Report of a Committee of the Board of Directors of the African Institution made on the 22d of February, 1820, and published by order of that Board* (London, 1820), 7.

[28] *Parl. Deb.*, XXXI, 773-74. In *A Review of the Colonial Slave Registration Acts* the self-interest of the master was called the "executory principle" of the bill. According to Brougham (*Edinburgh Review*, XXV, 336), the proposed law would have "the inestimable advantage of executing itself." The abolitionists believed that a registration law that depended for enforcement upon its penal provisions would not, in the state of public opinion in the West Indies, actually be enforced; see *The Speech of James Stephen*, referred to above, 27-30.

[29] The constitutional phase of the opposition will be considered at length later.

[30] Minutes of the Standing Committee of West India Planters and Merchants (MS.), IV, 347-48. In the second half of the eighteenth century it became customary for the planters and merchants of the West Indies resident in London to hold meetings, and there came into existence an association known as "The West India Planters and Merchants," with a permanent committee called the "Standing Committee." See Lillian M. Penson, *The Colonial Agents of the British West Indies*, 197-211, and also an article by the same author in *The English Historical Review*, July, 1921, entitled "The London West India Interest in the Eighteenth Century." The manuscript minute books of the Standing Committee are in the possession of the West India Committee, 14 Trinity Square, London. For the privilege

of examining them I am indebted to the good offices of Sir Charles Lucas, and to the courtesy of Mr. A. E. Aspinall and Mr. G. N. Knight, Secretary and Assistant Secretary, respectively, of the West India Committee.

[31] Minutes of the Standing Committee of West India Planters and Merchants, IV, 352-54, 355; Dominica, Journals of the House of Assembly, Dec. 19, 1815, C. O. 74:12.

[32] These resolutions are printed in *The Royal Gazette* (Jamaica), XXXVIII, no. 14, March 30-April 6, 1816, p. 18; also in *Thoughts on the Abolition of the Slave Trade, and Civilization of Africa; with Remarks on the African Institution, and an Examination of the Report of their Committee, recommending a General Registry of Slaves in the British West India Islands* (London, 1816), 190-92. This pamphlet was published anonymously, but is known to be the work of Joseph Marryat, agent for Grenada.

[33] *Journals of the Assembly of Jamaica*, XII, 688, 692, 696-97.

[34] Dominica, Journals of the House of Assembly, Feb. 14, 1816, C. O. 74:12; Tobago, Minutes of Assembly, April 9, 10 and 13, 1816, C. O. 288:10 and C. O. 285:21; Bahama Islands, Journal of the House of Assembly, Dec. 15 and 28, 1815, C. O. 26:19. The Barbados resolutions, unanimously adopted by the House of Assembly on January 17, 1816, are printed in G. W. Jordan, *An Examination of the Principles of the Slave Registry Bill, and of the Means of Emancipation proposed by the Authors of the Bill* (London, 1816), 143-44 and in *The Report from a Select Committee of the House of Assembly, appointed to inquire into the Origin, Causes, and Progress of the late Insurrection* (Barbados, printed by order of the Legislature), appendix, 57-58. The report of the Antigua Legislature against the Registry Bill was adopted before Nov. 24, 1815 (Antigua, Minutes of the Legislative Council, Letter of A. Browne to the President of the Council and Speaker of the House, dated Jan. 22, 1816, C. O. 9:47), but the legislative journals of Antigua for 1815 are not found in the sessional papers of the colony in the Public Record Office. The Nevis resolutions are referred to in the Journals of the House of Assembly of that island under date of April 4, 1816, C. O. 186:11.

[35] Barbados, Journals of the Assembly, Aug. 27, 1816, C. O. 31:47.

[36] *The Royal Gazette* (Jamaica), XXXVII, no. 51, p. 11. Resolutions of other parish meetings are printed in *ibid.*, XXXVII, no. 49, pp. 23, 25, 26, 28, no. 50, p. 28, no. 51, pp. 13, 24; XXXVIII, no. 2, p. 15, no. 3, p. 30, no. 6, p. 14.

[37] *Journals of the Assembly of Jamaica*, XII, 696-97; Bahama

Islands, Journal of the House of Assembly, Dec. 28, 1815, C. O. 26:19; Tobago, Minutes of Assembly, April 13, 1816, C. O. 288:10; Jordan, *op. cit.*, 144; Letters from the Honourable Committee of Correspondence [of Jamaica] to the Agent, 1794-1833, under date of Nov. 7, 1815. These leters are in MS. in the West India Reference Library of the Institute of Jamaica. Mr. Frank Cundall, the Librarian, has most courteously furnished me with extracts from them relating to the Registry Bill.

[38] A. Browne to the President and Speaker, Jan. 22, 1816, Antigua, Minutes of the Legislative Council, C. O. 9:47; Virgin Islands, Journals of Assembly, Aug. 17, 1816, C. O. 316:3.

[39] For the titles see above, notes 32 and 34.

[40] Minutes of the Standing Committee of West India Planters and Merchants, IV, 357-65. These resolutions are printed in *The Royal Gazette* (Jamaica), XXXVIII, no. 11, March 9-16, 1816, p. 26, and in *Brief Remarks on the Slave Registry Bill and upon a Special Report of the African Institution, recommending that Measure* (London, 1816), 51 *et seq.*

[41] Minutes of the Standing Committee of West India Planters and Merchants, IV, 365-67. On February 17, 1816, the West India Planters and Merchants of Edinburgh adopted a petition to the House of Commons against the bill, and similar resolutions of protest were adopted by the Association of West India Merchants and Planters of Glasgow on March 5, 1816; see *The Royal Gazette* (Jamaica) XXXVIII, no. 17, p. 20; no. 24, p. 2.

[42] Among these were: *Brief Remarks on the Slave Registry Bill and upon a Special Report of the African Institution recommending that Measure* (London, 1816); *Negro Emancipation made easy; with Reflections on the African Institution and Slave Registry Bill,* by "A British Planter" (London, 1816); *The Penal Enactments of the Slave Registry Bill examined in a Letter to Charles N. Pallmer, Esq., M.P.* (London, 1816); *A Letter to the Members of the Imperial Parliament, referring to the evidence contained in the proceedings of the House of Assembly of Jamaica, and shewing the injurious and unconstitutional tendency of the proposed Slave Registry Bill,* by "A Colonist" (London, 1816); *The Edinburgh Review and the West Indies; with Observations on the Pamphlets of Messrs. Stephen, Macaulay, etc., and Remarks on the Slave Registry Bill,* by "Colonist" (Glasgow, 1816); *The Interference of the British Legislature in the Internal Concerns of the West India Islands, respecting their*

Slaves, deprecated, by "A Zealous Advocate for the Abolition of the Slave Trade" (London, 1816).

[43] Agents Letters, 1814-1824 (MS. vols. in West India Reference Library of the Institute of Jamaica), George Hibbert to the Committee of Correspondence, March 7, 1816. I am indebted to Mr. Cundall, (see note 37, above), for extracts from these letters.

[44] *The Life of William Wilberforce,* IV, 282, 286.

[45] A minute of this conference is attached to Minutes of the Standing Committee of West India Planters and Merchants, March 5, 1816.

[46] Accounts of this meeting at the Colonial Office are in Barbados, Journals of the Assembly, Aug. 6, 1816, C. O. 31:47 and in Virgin Islands, Journals of Assembly, Aug. 17, 1816, C. O. 316:3.

[47] This circular is in C. O. 29:30, p. 29 *et seq.* The reason for a registration of slaves, Lord Bathurst explained, was that the recent return of peace would open facilities for the violation of the laws, which had not existed while the war was in progress. "At that time," he wrote, "all the West India Islands, with little exception, were in our possession, and our Laws for the Prohibition of the Slave Trade enforced within them. The appearance of a trading vessel, if she did not sail in convoy, was enough to create suspicion, and the vessel was liable to search. At the Peace, most of the captured Islands have been restored, and although the Powers to whom they have been restored have concurred in the prohibition of the Slave Trade, we cannot have the same assurance that such a Traffick has no existence in some of their possessions. . . . . Under these circumstances, a systematic Evasion of the Laws may gradually grow up." *Cf.* James Stephen to Earl Bathurst, June 12, 1815, Historical Manuscripts Commission, *Report on the Manuscripts of Earl Bathurst,* 351-53.

[48] *A Review of the Colonial Slave Registration Acts* (London, 1820), 4. The colonial slave registration laws are contained in five collections of papers presented to the House of Commons and printed by its order, viz: (1) "Colonial Laws respecting Slaves," April 5, 1816; (2) "Colonial Laws and Correspondence respecting Slaves," February 26, 1817; (3) "Additional Colonial Laws respecting Slaves," June 6, 1817; (4) "Further Papers relative to the Treatment of Slaves in the Colonies," June 10, 1818; (5) "Papers relating to the Treatment of Slaves in the Colonies," June 7, 1819. These laws provided for the transmission to the Colonial Office of copies of the registries, and in 1819 Parliament established a Registry of Colonial Slaves in England (59 Geo. 3, c. 120) and provided that

after January 1, 1820, it should not be lawful for any British subject in the United Kingdom "to purchase, or to lend or advance any money, goods, or effects upon the security of any Slave or Slaves in any of his Majesty's colonies or foreign possessions, unless such Slave or Slaves shall appear by the return received therein to have been first duly registered in the said office of the Registrar of Colonial Slaves."

[49] *A Review of the Colonial Slave Registration Acts*, 113-15, 119, 125.

[50] *Memoirs of the Life of Sir Samuel Romilly* (2d ed., London, 1840), III, 254.

[51] *The Report from a Select Committee of the House of Assembly*, mentioned above. Sir James Leith, Governor of Barbados, thought that the chief cause of the insurrection was "the misrepresentation and instigation of ill-disposed Persons, who have been endeavouring to induce a belief that the Slaves were actually made free, but that the Manumissions were improperly withheld from them." Address to the Slave Population of the Island of Barbados, C. O. 28:85.

[52] Virgin Islands, Journals of Assembly, August 17, C. O. 316:3.

[53] *Parl. Deb.*, XXXIV, 1189, 1225, 1277-78.

[54] *The Life of William Wilberforce*, IV, 307.

[55] R. Coupland, *Wilberforce*, 459.

[56] For American colonial opinion regarding internal legislation see Charles Frederic Mullett, "Colonial Claims to Home Rule," *The University of Missouri Studies*, II, no. 4. The Rockingham Whigs, especially Burke, said little of this wider American claim, and their speeches and writings have had great influence upon the historical interpretation of the causes of the Revolution. See Sidney George Fisher, "The Legendary and Myth-Making Process in Histories of the American Revolution," *Proceedings of the American Philosophical Society*, LI, 53 *et seq.*

[57] S. E. Morison, *Sources and Documents illustrating the American Revolution, 1764-1788, and the Formation of the Federal Constitution*, 17. For similar resolutions adopted by other assemblies see *The Public Records of the Colony of Connecticut* (May, 1762 to Oct., 1767), 423, and *Records of the Colony of Rhode Island and Providence Plantations in New England*, VI, 452.

[58] *Journals of the Continental Congress*, ed. by W. C. Ford, I, 67.

[59] *Ibid.*, 68-69. This resolution, which the conservatives in the Con-

tinental Congress objected to as aiming at independence, was prepared by John Adams; *ibid.*, 63, footnote 2.

[60] McIlwain, *The American Revolution*, 116.

[61] For an illuminating discussion of this phase of colonial opinion see R. G. Adams, *op. cit.*, chaps. iii, v, vii.

[62] *Journals of the Assembly of Jamaica*, VI, 569-70.

[63] *The Political Writings of John Dickinson* (Wilmington, 1801), I, 329 *et seq.*

[64] *Ibid.*, 361, 395, 399, 400, 401.

[65] Bryan Edwards, *The History, Civil and Commercial, of the British Colonies in the West Indies* (Dublin, 1793), II, 341-43. Sir Charles Lucas thinks that Edwards intended to assert that the West India colonies were legally independent of Parliament; see his edition of Sir G. C. Lewis, *An Essay on the Government of Dependencies*, 349.

[66] Edwards, II, 343-46.

[67] *Parl. Deb.*, XXXI, 776-78.

[68] *Ibid.*, 781-82.

[69] The statute in question (18 Geo. 3, c. 12) enacted "that from and after the passing of this Act the King and Parliament of Great Britain will not impose any Duty, Tax, or Assessment whatever, payable in any of His Majesty's Colonies, Provinces or Plantations in North America or the West Indies; except only such duties as it may be expedient to impose for the Regulation of Commerce: the net produce of such duties to be always paid and applied to and for the use of the Colony, Province or Plantation in which the same shall be respectively levied in such manner as other duties collected by the authority of the respective General Courts or General Assemblies of such Colonies are ordinarily paid and applied."

[70] *Journals of the Assembly of Jamaica*, XII, 696.

[71] *The Royal Gazette* (Jamaica), XXXVIII, no. 14, p. 18.

[72] C. O. 26:19.

[73] Jordan, *op. cit.*, 61.

[74] C. O. 74:12.

[75] C. O. 285:21.

[76] *Journals of the Assembly of Jamaica*, XII, 782-83.

[77] Bahama Islands, Journal of the House of Assembly, Dec. 28, 1815; C. O. 26:19.

[78] *The Royal Gazette* (Jamaica), XXXVIII, no. 22, p. 2. The writer, who signed himself "Colonist," contributed a series of letters

to the *Glasgow Courier*, entitled "The Edinburgh Review and the West Indies," which were reprinted in *The Royal Gazette*.

[79] Jordan, *op. cit.*, 62-63.

[80] *Reasons for establishing a Registry of Slaves in the British Colonies*, 95-97, 99.

[81] *Edinburgh Review*, XXV, 343; *Reasons*, etc., 105; *Parl. Deb.*, XXXI, 774.

[82] *Reasons*, etc., 103-5. In his circular letter to the governors of the West Indies (June 28, 1816) Lord Bathurst said: "The 18 Geo. 3d. cap. 12, which makes an exception, proves the general Right of Legislation over the Colonies." C. O. 29:30.

[83] See, e.g., Jordan, *op. cit.*, 70.

[84] Bahama Islands, Journal of the House of Assembly, Dec. 15, 1817, C. O. 26:19.

[85] Jordan, *op. cit.*, 57. See also Marryat, *Thoughts on the Abolition of the Slave Trade*, 180.

[86] *Journals of the Assembly of Jamaica*, XII, 784.

[87] Bahama Islands, Journal of the House of Assembly, Dec. 15, 1815, C. O. 26:19. No less a personage than Lord Chancellor Camden, speaking against the Declaratory Act when it was before the House of Lords, said of it that it was a bill "the every existence of which is illegal, absolutely illegal, contrary to the fundamental laws of nature, contrary to the fundamental laws of this constitution, a constitution grounded on the eternal and immutable laws of nature." *Parliamentary History*, XVI, 178.

[88] C. O. 74:12.

[89] Jordan, *op. cit.*, 57.

[90] *Ibid.*, 56. For the Renunciation Act of 1783, see above, p. 100.

[91] *Ibid.*, 68-69. With regard to Parliament's relation to the American colonies, Franklin wrote in 1768; "The more I have thought and read on the subject, the more I find myself confirmed in opinion that no middle doctrine can be well maintained; I mean not clearly and with intelligible arguments. Something might be made of either of the extremes: that Parliament has a power to make *all laws* for us, or that it has a power to make *no laws* for us; and I think the arguments for the latter more numerous and weighty than those for the former." The West India distinction between internal and external legislation was distinctly a "middle doctrine"; and by conceding to Parliament a right to regulate the external commerce of the colonies, Jordan virtually refuted his own contention that they

were in a position, relative to Parliament, analogous to that of Ireland after 1783.

[92] Bahama Islands, Journal of the House of Assembly, Dec. 15, 1815; C. O. 26:19.

[93] *Journals of the Assembly of Jamaica,* XII, 785.

[94] Dominica, Journals of the House of Assembly, Feb. 14, 1816; C. O. 74:12. Report of the Joint Committee of the Tobago Legislature, cited above, C. O. 285:21.

[95] C. O. 29:30.

[96] Wilberforce, *An Appeal to the Religion, Justice, and Humanity of the Inhabitants of the British Empire, in behalf of the Negro Slaves in the West Indies* (London, 1823), 25-27, 34-35, 40-42; *The Life of William Wilberforce,* V, 131; Clarkson, *Thoughts on the Necessity of Improving the Condition of the Slaves in the British Colonies, with a View to their ultimate Emancipation* (London, 1823), 1, 3-4; *Parliamentary Debates,* new series, VIII, 626-27, IX, 276; *Edinburgh Review,* XXXVIII, 169-71, XXXIX, 126.

[97] *The Life of William Wilberforce,* V, 157-58; R. Coupland, *Wilberforce,* 473.

[98] The history of the anti-slavery movement from 1823 to the passing of the Emancipation Act in 1833 is related in William Law Mathieson, *British Slavery and its Abolition,* chaps. ii and iii.

[99] Since his election to Parliament in 1818 Buxton had been devoting himself to philanthropic causes and had won the admiration of Wilberforce, who, in 1821, invited him to become his coadjutor and successor in the campaign for emancipation which the veteran abolitionist was already meditating. After long and careful deliberation Buxton decided that it was his duty to accede to this request. See *Memoirs of Sir Thomas Fowell Buxton, Bart.,* ed. by his son, Charles Buxton (London, 1855), 80 *et seq.,* 93, 126 *et seq.*

[100] *Parl. Deb.,* new series, IX, 274-75.

[101] *Ibid.,* IX, 265-66, 268, 273.

[102] *Ibid.,* IX, 285-86.

[103] *Ibid.,* X, 1106.

[104] *Ibid.,* IX, 286.

[105] *Ibid.,* IX, 295, 336.

[106] *Ibid.,* IX, 295, 326, 360.

[107] *Ibid.,* XIV, 1175. The Government never explained why it permitted nearly three years to elapse between the passing of the resolutions by the House of Commons and their introduction into the

House of Lords. Lord Liverpool, the Prime Minister, said that he had no satisfactory reason to give. *Ibid.*, XIV, 1152.

[108] *Parliamentary Papers*, 1824, XXIV, "Papers presented to Parliament by His Majesty's Command, in explanation of the measures adopted by His Majesty's Government for the Melioration of the condition of the Slave Population in His Majesty's Possessions in the West Indies and on the Continent of South America," No. 1, p. 4. This collection of papers and succeeding installments in continuation thereof will be referred to hereinafter as "Slave Melioration Papers." Bathurst's despatch of May 28, 1823, is printed in Klingberg, *The Anti-Slavery Movement in England*, 336-37. The Dutch provinces of Berbice, Demerara and Essequibo were seized by the British in 1803 and ceded to Great Britain in 1814. As crown colonies, without representative assemblies, they were subject to the legislative authority of the King in Council. In 1831 they were united into the single colony of British Guiana.

[109] *Parl. Papers*, 1824, XXIV, "Slave Melioration Papers," No. 1, p. 3.

[110] *Ibid.*, 8-13; Klingberg, *op. cit.*, 338-50.

[111] In the debate of May 15 Brougham took pains to state explicitly that the right to make laws for all the King's subjects was "inherent in the British legislature," and that it had never been abandoned, except in the matter of taxation. *Parl. Deb.*, new series, IX, 338.

[112] In his *Appeal* (50-51) Wilberforce said that the West Indies realized that the fate of their slaves depended on *who* carried out the reforms, and that therefore they took their principal stand "on the ground of objecting to the interference of the imperial legislature for the protection of the slaves." He showed a strange ignorance — or forgetfulness — of the proceedings of the West India assemblies in connection with the Registry Bill when he said, "Few, if any, are bold enough to claim for the assemblies an exclusive jurisdiction on these subjects as their right. They only tell us of the *delicacy* of Parliamentary interference in such matters of internal legislation." The author of an anonymous abolitionist pamplet, published in 1823, showed a better knowledge of West India opinion on this subject when he predicted that the colonists would probably say: "What we object to is ANY ATTEMPT ON THE PART OF PARLIAMENT TO LEGISLATE FOR THE COLONISTS; as such an attempt would be a violation of the sacred rights of the Colonies,

whose local legislatures ALONE ought to make laws for their internal government.'' A Review of Some of the Arguments which are commonly advanced against Parliamentary Interference in behalf of the Negro Slaves, with a Statement of Opinions which have been expressed on that subject by many of our most distinguished Statesmen (London, 1823), 17-18.

113 In 1823 the slave population of Jamaica was approximately 336,000 and that of the rest of the British West India colonies approximately 380,000. *Parl. Papers,* 1833, XXVI, H. C. 539.

114 *The Royal Gazette* (Jamaica), XLV, no. 43, p. 17.

115 *Ibid.*, 21.

116 *Journals of the Assembly of Jamaica,* XIV, 183.

117 *Ibid.*, 226-27.

118 *Ibid.*, 227.

119 *Ibid.*, 227-28.

120 *Ibid.*, 228.

121 *Parl. Papers,* 1824, XXIV, ''Slave Melioration Papers,'' no. 2, p. 4.

122 *Ibid.*, 6.

123 *An Official Letter from the Commissioners of Correspondence of the Bahama Islands to George Chalmers, Esq., Colonial Agent, concerning the proposed Abolition of Slavery in the West Indies* (Nassau, reprinted in London, 1823).

124 *Parl. Papers,* 1824, XXIV, ''Slave Melioration Papers,'' no. 2, p. 12 *et seq.*

125 *Ibid.*, 15.

126 *Ibid.*, 72-73.

127 *Ibid.*, 75-76.

128 *Ibid.*, 62.

129 *Parl. Deb.*, new series, X, 1097 *et seq.*

130 ''There are three possible modes in which Parliament might deal with the people of Jamaica: First . . . . it might crush them by the application of direct force; — Secondly, It might harass them by fiscal regulations, and enactments restraining their navigation; and, Thirdly, it may pursue the slow and silent course of temperate, but authoritative admonition.'' *The Speech of the Rt. Hon. George Canning in the House of Commons on the 16th day of March, 1824* (London, 1824), 25; see also *Parl. Papers,* 1831-32, XLVI, ''Slave Melioration Papers,'' p. 4.

131 *Parl. Deb.*, new series, X, 1113-14, 1145 *et seq.*, 1169.

[132] *Ibid.*, XI, 1406 *et seq.*

[133] *An Official Letter from the Commissioners of Correspondence of the Bahama Islands to George Chalmers*, 30.

[134] *Parl. Deb.*, new series, XIV, 1166. In *The Slavery of the British West India Colonies Delineated* (London, 1824), I, xxxi-ii, James Stephen ridiculed the idea of a rebellion of the West India planters. If it should occur, he said, it could be put down "by a new and cheap mode of warfare; not by sending out troops, but withdrawing them. The most terrible of all hostile operations, would be the leaving them to themselves."

[135] See, e.g., J. F. Barham, *Considerations on the Abolition of Negro Slavery and the Means of practically effecting it* (London, 1823), 23.

[136] *Parl. Papers*, 1824, XXIV, "Slave Melioration Papers," no. 1, pp. 5-6.

[137] *Parl. Papers*, 1826, XXIX, "Slave Melioration Papers," 109-110; James M'Queen, *The West India Colonies; the Calumnies and Misrepresentations circulated against them by the Edinburgh Review, Mr. Clarkson, Mr. Cropper, &c.* (London, 1824), 363-64; *A Communication from Sir Charles Brisbane &c.*, 60 *et seq.*; *Memoirs of Sir Thomas Fowell Buxton*, 147 *et seq.*

[138] *Parl. Deb.*, new series, X, 1097 *et seq.*

[139] The text of this document can be found in *Parl. Papers*, 1825, XXVI, "Slave Melioration Papers," 124 *et seq.*, and in *Parl. Deb.*, new series, X, 1064 *et seq.* It is summarized in *Edinburgh Review*, XLIII, 428-29.

[140] *Parl. Papers*, 1825, XXVI, "Slave Melioration Papers," 143-44, 152.

[141] *Journals of the Assembly of Jamaica*, XIV, 318, 368; *Parl. Papers*, 1825, XXVI, "Slave Melioration Papers," 11-12.

[142] *Parl. Papers*, 1826, XXIX, "Slave Melioration Papers," 1.

[143] *Ibid.*, 5-6.

[144] *Parl. Deb.*, new series, XIV, 1141. This statement is supported by the facts set forth in "An Abstract of Provisions for Meliorating the Condition of the Slaves which have been enacted by some of the West India Legislatures, since May, 1823, in compliance with suggestions of His Majesty's Government," *Parl. Papers*, 1826, XXIX.

[145] *Parl. Papers*, 1826-27, XXV, "Slave Melioration Papers," Part I, 1-23.

[146] *Journals of the Assembly of Jamaica*, XIV, 595. The published

journals of the Jamaica Assembly end with 1826. The later journals are in the Jamaica sessional papers in the Public Record Office, C. O. 140. These are at present in the branch of the P. R. O. at Cambridge.

147 *Ibid.*, 624; *Parl. Papers*, 1826-27, XXV, "Slave Melioration Papers," Part I, 60.

148 *Parl. Papers*, 1829, XXV, "Slave Melioration Papers," 15 *et seq.*

149 *Parl. Papers*, 1826-27, XXV, "Slave Melioration Papers," Part I, 60; *Parl. Papers*, 1828, XXVII, "Slave Melioration Papers," 1-20.

150 *Parl. Papers*, 1830, XXI, "Slave Melioration Papers," 4, 37; *Parl. Papers*, 1831-32, XLVI, "Slave Melioration Papers" (presented in Mar., 1832), 3, 59.

151 *Parl. Papers*, 1831-32, XLVI, "Slave Melioration Papers" (presented in March, 1832), 3 *et seq.*; Klingberg, *op. cit.*, 360 *et seq.*

152 *Parl. Papers*, 1831-32, XLVI, "Slave Melioration Papers" (presented on 6 Dec., 1831), 93 *et seq.*

153 *Parl. Papers*, 1831-32, XLVI, "Slave Melioration Papers" (presented in July, 1832), 3.

154 *Parl. Papers*, 1831-32, XLVI, "Slave Melioration Papers" (presented in Aug., 1832), 21.

155 *Parl. Papers*, 1831-32, XLVI, "Slave Melioration Papers" (presented in March, 1832), 9.

156 *Parl. Papers*, 1831-32, XLVI, "Slave Melioration Papers" (presented in Aug., 1832), 73.

157 *Ibid.*, 74.

158 *Ibid.*, 103 *et seq.*

159 *Ibid.*, 137.

160 *Ibid.*, 152.

161 *Ibid.*, 160.

162 *Parl. Papers*, 1831-32, XLVI, "Slave Melioration Papers" (presented in July, 1832), 3 *et seq.*

163 *Ibid.*, 7.

164 *Parl. Papers*, 1831-32, XX, "Report from Select Committee on the Extinction of Slavery throughout the British Dominions, with the Minutes of Evidence," 2.

165 *Ibid.*, 4.

166 3 & 4 Gul. 4, c. 73.

167 Votes of the Honourable House of Assembly of Jamaica, in a

Session begun October 30 and ended December 14, 1832, p. 22, C. O. 140:122; *Parl. Deb.*, 3d series, XVIII, 113.

168 *Parl. Deb.*, 3d series, VI, 113.

169 *Ibid.*, 114-15, 139, 143.

170 Votes of the Honourable House of Assembly of Jamaica, in a Session begun October 30 and ended December 14, 1832, pp. 22, 34, 51. In an address to the House of Commons protesting against the Government's abolition resolutions the Assembly of Barbados said that the colony had been deprived of "virtual representation"; Barbados, Journal of the Assembly, 6 July, 1833, p. 1, C. O. 31:51.

171 *Parl. Deb.*, 3d series, XVIII, 114, 205.

172 *Ibid.*, XVIII, 113 *et seq.*

173 *Ibid.*, XVIII, 345, 359.

174 *Ibid.*, XVIII, 549-50.

175 C. O. 140:123, p. 295 *et seq.* (Jamaica); C. O. 74:21 (Dominica); C. O. 263:7 (St. Vincent). In a speech to the Legislature of the Bahama Islands (Nov. 12, 1833) the Lieutenant-Governor said: "It has not escaped my observation, that there are, at this instant, some over anxious Members of the Legislature, who would not hesitate, if they had a fair opportunity, to record . . . . their grievous dislike to what they deem an unconstitutional interference with Colonial privileges." C. O. 26:23, p. 245.

176 "An Act for the Abolition of Slavery in this Island in Consideration of Compensation and for promoting the industry of the manumitted Slaves and to declare the fifty-second of George the third, chapter one hundred and fifty-five, in force in this island." C. O. 139:71.

177 C. O. 140:125, p. 15.

178 The Jamaica Abolition Act and acts in aid are analyzed in *Parl. Papers*, 1836, XV, Report from the Select Committee on Negro Apprenticeship in the Colonies, Appendix, 12 *et seq.*

179 6 & 7 Gul. 4, c. 16.

180 Votes of the Assembly of Jamaica, 14 June, 1836, C. O. 140:126. The Memorial is printed in *Parl. Papers*, 1836, XV, Report from the Select Committee on Negro Apprenticeship, 519-22. A brief summary is given in *The Annual Register* (1836), 323-24.

181 *Parl. Papers*, 1836, XV, Report from the Select Committee on Negro Apprenticeship, 517.

182 *Ibid.*, iii-ix.

183 See, e.g., *Parl. Deb.*, 3d series, XLI, 1, 2, 7-8, 53, 81. A member

of the House of Commons said (May 28, 1838) that more than 3,000 petitions had been presented to the House, signed by upwards of 1,000,000 people. *Ibid.*, XLIII, 408-9.

184 *Parl. Deb.*, 3d series, XLI, 803-4.

185 *Ibid.*, 820.

186 1 & 2 Vict., c. 19.

187 This Protest is recorded in Votes of the Assembly of Jamaica, 16 June, 1838, C. O., 140:129. It can be found in *Parl. Papers*, 1839, XXXV, [107], 50-52.

188 *Parl. Papers*, 1837, VII, H. C. 510.

189 *Parl. Papers*, 1837-38, XL, [596] and [596-II].

190 1 & 2 Vict., c. 67.

191 *Parl. Papers*, 1839, XXXV, [107], 3.

192 *Parl. Papers*, 1837-38, XL, H. C. 682.

193 LX, Pt. 2, no. 13 (Sept. 29, 1838), 298.

194 Votes of the Assembly of Jamaica, Oct. 31, 1838, C. O. 140:129. The resolutions are given in *The Annual Register* (1839), 97.

195 At a meeting of "Blacks and other Inhabitants of the City and Parish of Kingston," resolutions were adopted declaring that the resolutions of the Assembly were "disrespectful and unconstitutional towards the authority of the Supreme Legislature of the empire," and recognizing "the inherent right of the mother country to exercise, in all extraordinary and peculiar emergencies, the power of paramount legislation for any of her colonies, a power without which the general uniformity, stability, and welfare of the empire would be constantly endangered." *Parl. Papers*, 1839, XXXV, [107], 226 *et seq.*

196 Votes of the Assembly of Jamaica, Nov. 2, 1838, C. O. 140:129.

197 *Parl. Papers*, 1839, XXXV, [107], 158-59.

198 *Parl. Papers*, 1839, IV, H. C. 170.

199 *Parl. Deb.*, 3d ser., XLVII, 967, 974.

200 2 & 3 Vict., c. 26.

201 *Parl. Papers*, 1840, XXXV, "Papers relative to the West Indies," Pt. I, 2-3.

202 *Ibid.*, 74-76. John William Kaye, *The Life and Correspondence of Charles, Lord Metcalfe*, II, 255-57.

203 *Parl. Papers*, 1840, XXXV, "Papers relative to the West Indies," Pt. I, 81-83. In a despatch to the Colonial Secretary, Metcalfe said that the Assembly had passed "some objectionable resolutions, explaining the grounds of their receding from their

former determination'' and had used ''some exceptionable expressions'' in reply to his address. But he did not think it necessary to take notice of either, ''hoping that they may be the last remains of past irritation.'' *Ibid.*, 77.

[204] *Ibid.*, 88.

[205] This figure refers to the Jamaica election of 1838. *Parl. Papers*, 1839, XXXV, [107], 176-77.

[206] A number of extracts from this document are given in *Autobiography of Henry Taylor*, I, 250 *et seq.*

[207] *Ibid.*, I, 260-61.

[208] *Parl. Deb.*, 3d series, XLVII, 825 *et seq.*

Chapter V

[1] Imperial Conference, 1926, *Summary of Proceedings*, Cmd. 2768, p. 14.

[2] *Ibid.*, 18.

[3] *The Writings of James Madison*, ed. by Gaillard Hunt, VI, 373.

[4] Pp. 42-43.

[5] *Journal of the Parliaments of the Empire*, VIII (1927), 15-18, 312, 364, 505-7; Edward Jenks, ''The Imperial Conference and the Constitution,'' *The Cambridge Law Journal*, III, 13.

[6] Letter to the Sheriffs of Britsol, *The Works of the Right Honorable Edmund Burke* (Boston, 1869), II, 230, 232.

[7] Speech on Conciliation with America, *Works*, II, 140-41.

[8] *Ibid.*, 105, 179.

[9] See, especially, Letter to the Sheriffs of Bristol, *Works*, II, 187 *et seq.*

[10] See quotations given by G. B. Adams in ''The Influence of the American Revolution on England's Government of her Colonies,'' *Annual Report of the American Historical Association*, 1896, I, 375.

[11] Paul Knaplund, *Gladstone and Britain's Imperial Policy*, 10.

[12] See Adams, *op. cit.*, and H. W. V. Temperley, ''Great Britain and her Colonies,'' in *The Cambridge Modern History*, XI, 754-55.

[13] *Some Reflections on the Speech of the Rt. Hon. Lord John Russell on Colonial Policy* (London, 1850).

[14] For Buller's *Sketch of Lord Durham's Mission to Canada in 1838*, see *Lord Durham's Report on the Affairs of British North America*, ed. by Sir C. P. Lucas, III, 336-80.

[15] Aileen Dunham, *Political Unrest in Upper Canada, 1815-1836*, 166.

[16] *Ibid.*, 169.

[17] See *The Dominions Office and Colonial Office List* (1927), 814. Southern Rhodesia has possessed responsible government since 1923, but its legislature is subject to certain restrictions which are not consistent with full Dominion status. Though classed as a self-governing colony, it is not a Dominion. Nevertheless, it falls within the purview of the Dominions Office, not of the Colonial Office. Malta, which is under the Colonial Office, has since 1921 possessed responsible government in local affairs, but matters of imperial concern are expressly reserved for imperial control. For brief sketches of the constitutions of Southern Rhodesia and Malta, see A. B. Keith, *The Constitution, Administration and Laws of the Empire*, 240-46.

[18] See E. M. Wrong, *Charles Buller and Responsible Government*, 83.

[19] For separatist utterances looking to an eventual alliance or partnership of English-speaking peoples, see J. A. Roebuck, *The Colonies of England* (London, 1849) and Goldwin Smith, *The Empire* (London, 1863). In *Greater Britain* (London, 1868) Charles Dilke wrote: "After all, the strongest of the arguments in favor of separation is the somewhat paradoxical one that it would bring us a step nearer to the virtual confederation of the English race." The mid-Victorian anti-imperialists by no means deserve the censure that imperialists have been fond of heaping upon them. "On the whole," Mr. H. Duncan Hall judiciously remarks, "it is fair to say that the emphasis put by the separatists on the development of an independent and self-reliant spirit in the Colonies, played a large part in helping to foster the growth of Dominion nationhood, and an even greater part in forcing England to recognize this vital factor." *The British Commonwealth of Nations*, 52.

[20] Moribund, that is, as a concept of lawyers. For extreme reformers, as Professor John Dickinson remarks, the idea of a "higher law" possesses a perennial appeal. *Political Science Quarterly*, XLIII, 54. The expression "natural justice" occurs in present-day English judicial opinions, but it would seem to refer merely to rules of English jurisprudence which are regarded as elementary, such as that no man must be condemned unheard. See William A. Robson, *Justice and Administrative Law*, 149-50, 169. The phrase does not imply that

the judge using it considers the rule in question to be unalterable by Act of Parliament.

[21] Blackstone, *Commentaries*, ed. by William Draper Lewis, I, 146.

[22] *Ibid.*, I, 31.

[23] *A Fragment on Government*, ed. by F. C. Montague, 213-14. For Bentham's view of "irrevocable laws," see *The Book of Fallacies*, chap. iii, in *The Works of Jeremy Bentham*, ed. by John Bowring, II, 401-8.

[24] *Report*, ed. by Lucas, II, 73.

[25] See my "Rise of Anti-Imperialism in England," *Political Science Quarterly*, XXXVII, 440-71, and Bodelsen, *Studies in Mid-Victorian Imperialism*, 13-22. In a letter written to Lord Durham while he was in Canada in 1838, Robert Baldwin referred to "the repeated references to the arrival of a time when these Colonies must cease to be a part of the British Empire which have not unfrequently proceeded from the very servants of the Crown," and said that Durham was "the first statesman to avow a belief in the possibility of a permanent connection between the Colonies and the Mother Country." *The Durham Papers*, Report on Canadian Archives (1923), 327.

[26] *Report*, ed. by Lucas, II, 281-82.

[27] *Parl. Debates*, 3d series, CVIII, 578.

[28] *Ibid.*, 576-77. For the text of a constitution for New South Wales proposed by Molesworth, see *Selected Speeches of Sir William Molesworth*, ed. by Hugh Edward Egerton, 392 *et seq.*

[29] Knaplund, *op. cit.*, 72 *et seq.*

[30] See A. B. Keith, *Responsible Government in the Dominions*, (Oxford, 1912), I, 26-31, and Sweetman, *Australian Constitutional Development*, 283 *et seq.*

[31] It may be noted that the present constitution of Malta, which went into operation in 1921, embodies the principle of a hard-and-fast separation of imperial and colonial powers for which Molesworth contended three-quarters of a century ago. By "The Malta Constitution Letters Patent, 1920," the legislature of Malta is empowered to make laws for "the peace, order and good government of the Colony," except with respect to "reserved matters," which include control of naval, military and air forces, defence of the colony, submarine cables, wireless telegraphy and telephony, "imperial property and interests," external trade, coinage and currency, immigration, naturalization, and treaties. By Letters Patent con-

stituting the Office of Governor, the latter is authorized to legislate by ordinance with respect to "reserved matters," concerning which it is provided that the King in Council also may make such laws as may seem necessary. Corresponding to the division of legislative authority, there is a division in the executive government of the colony. There is an Executive Council, consisting of ministers, who are members of the colonial legislature and responsible to it, and a Nominated Council, which assists the Governor in the administration of "reserved matters." In a despatch to the Governor of Malta, Lord Milner, then Secretary of State for the Colonies, explained that it was necessary to define the spheres of colonial and imperial authority, since otherwise there would be "continual danger of friction arising from the inevitable tendency of one authority to encroach upon the domain of the other." See *Parliamentary Papers*, 1921, XXIV, "Papers relating to the New Constitution of Malta," Cmd. 1321.

[32] 13 & 14 Vict., c. 59, s. 27.

[33] 36 Vict., c. 22.

[34] Keith, *Selected Speeches and Documents on British Colonial Policy*, II, 60.

[35] 13 & 14 Vict., c. 59, s. 32.

[36] 28 & 29 Vict., c. 63, s. 5.

[37] Sir Arthur Hardinge, *The Life of Henry Howard Molyneux Herbert, Fourth Earl of Carnarvon*, I, 298-305.

[38] W. P. M. Kennedy, *The Constitution of Canada*, 301, 315.

[39] *The Canadian Constitution in Form and in Fact*, 2.

[40] *Parliamentary Debates on the Subject of the Confederation of the British North American Provinces* (Quebec, 1865), 583.

[41] This statement is substantially but not literally accurate. The Commonwealth of Australia Constitution Act, passed by the Imperial Parliament in 1900, is not identical with the draft constitution sent over from Australia. Joseph Chamberlain, then Colonial Secretary, repudiated the idea that Parliament should be regarded as a mere instrument to register the will of the Australian people, but he explained to the House of Commons that very few changes had actually been made in the Australian draft. Sir Henry Campbell-Bannerman, Leader of the Opposition, expressed regret that the Government had felt at liberty to make any alterations at all. Keith, *Selected Speeches*, I, 351 *et seq*; Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, 244. The constitution

of the Irish Free State was made by Dail Eireann, sitting as a constituent assembly, and was incorporated, with no change, in an Act of Parliament.

[42] Imperial Conference, 1926, *Appendices to the Summary of Proceedings*, Cmd. 2769, pp. 26-27. See also *Journal of the Parliaments of the Empire*, VIII (1927), 698-99.

[43] *Parliamentary Debates on the Subject of the Confederation of the British North American Provinces*, 44. An opponent of Confederation, predicting that it would result in the ultimate separation of British North America from the Empire, said that the idea underlying the project was the creation of a "kingdom, viceroyalty, or principality," which would stand in the same relation to the mother country as that of Scotland to England before the union. *Ibid.*, 527.

[44] *Ibid.*, 395.

[45] Joseph Pope, *Memoirs of the Right Honourable Sir John Alexander Macdonald*, I, 312-13. See also John S. Ewart, *The Kingdom of Canada*, 2-3.

[46] *Introduction to the Study of the Law of the Constitution*, chap. i.

[47] Imperial War Conference, 1917, *Extracts from Minutes of Proceedings and Papers laid before the Conference*, Cd. 8566, p. 59. See also Borden, *Canadian Constitutional Studies*, 71-72.

[48] For an interesting discussion showing the significance for the British Commonwealth of the distinction between legal power and constitutional right, see H. Duncan Hall, *The British Commonwealth of Nations* (London, 1920), chap ix. Writing shortly after the conclusion of peace, Mr. Hall urged that a general declaration of constitutional right be drawn up by a special constituent Imperial Conference, insuring equality of *constitutional* status between the Dominions and Great Britain, but not affecting the existing *legal* powers of the Imperial Crown and Parliament over the Dominions.

[49] See A. H. F. Lefroy, *The Law of Legislative Power in Canada*, 208-31.

[50] In the Treaty between Great Britain and Ireland, signed on December 6, 1921, to which legal effect was given by an Act of the Imperial Parliament passed in 1922 (12 Geo. 5, c. 4), it was agreed that Ireland should have "the same constitutional status in the Community of Nations known as the British Empire as the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, and the Union of South Africa," and that "the law,

practice and constitutional usage governing the relationship of the Crown or the representative of the Crown and of the Imperial Parliament to the Dominion of Canada shall govern their relationship to the Irish Free State." Canada has thus been recognized as the "model" Dominion.

[51] Lefroy, *op. cit.*, 211. Keith, *Responsible Government in the Dominions*, I, 412.

[52] Lefroy, *op. cit.*, 212.

[53] *Ibid.*, 213-15.

[54] "Its actual exercise," he adds, judiciously if not judicially, "is another matter." *Leading Cases in Canadian Constitutional Law*, xiv. It might seem that the Imperial Parliament by passing the Irish Free State Constitution Act, 1922 (13 Geo. 5, c. 1), divested itself of its legal power to legislate for the Free State and for all other Dominions as well. The first article of the Constitution, which is incorporated in a schedule to this Act, reads as follows: "The Irish Free State (otherwise hereinafter called or sometimes called Saorstát Eireann) is a co-equal member of the Community of Nations forming the British Commonwealth of Nations." It is clear enough that Parliament has no constitutional right to legislate for political communities whose equality with Great Britain it has thus recognized. But has it even the legal power to do so? The answer, I think, must be in the affirmative. In the first place, even if it had been the intention of Parliament to renounce its legal authority over the Dominions, it is a well-known principle of English constitutional law, a corollary of parliamentary sovereignty, that no Parliament can legally bind its successors. (Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed. 62-68). Legally, Parliament could repeal the Irish Free State Constitution Act and impose a different form of government upon Ireland. In the second place, the Constitution of the Free State provides that it shall be construed with reference to the Treaty between Great Britain and Ireland, and that if any provision of the Constitution is repugnant to any provision of the Treaty, it shall, to the extent of such repugnancy, be void and inoperative. The Treaty provides that "the law, practice and constitutional usage" governing the relationship of the Imperial Parliament to the Dominion of Canada shall govern its relationship to the Irish Free State, and it had been established beyond doubt that Parliament had the legal power to legislate for Canada. It would therefore appear that the first article of the Free State Constitution

would not warrant the contention that the Free State is not subject to the legal authority of the Imperial Parliament. The fact that the Treaty, confirmed by Act of Parliament, refers to "practice and constitutional usage," does not give to practice and constitutional usage the effect of law. Finally, it was expressly provided by Parliament in the Irish Free State Constitution Act itself that "nothing in the said Constitution shall be construed as prejudicing the power of Parliament to make laws affecting the Irish Free State in any case where, in accordance with constitutional practice, Parliament would make laws affecting other self-governing Dominions."

[55] See, e.g., Borden, *Canadian Constitutional Studies*, 71-72.

[56] As long ago as 1917, in the Constitutional Resolution to which reference has been made, the Imperial Conference recorded its opinion that the "readjustment of the constitutional relations of the component parts of the Empire . . . . should form the subject of a special Imperial Conference to be summoned as soon as possible after the cessation of hostilities," but the Conference of 1921, the first to be held after the War, resolved that, having regard to constitutional developments since 1917, no advantage would be gained by holding a constitutional conference. The Imperial Conference of 1923 made important recommendations respecting procedure in treaty-making, but it remained for the Conference of 1926, in the Report of its Committee on Inter-Imperial Relations, to put forth what may be called a general declaration of constitutional right. Pressure for such a statement came not from the most British of the Dominions but from "lesser breeds without the Law," South African Boers and Irish ex-republicans. See Imperial Conference, 1926, *Appendices to the Summary of Proceedings*, Cmd. 2769, p. 25, and A. Lawrence Lowell and H. Duncan Hall, *The British Commonwealth of Nations* (World Peace Foundation Pamphlets), 613-14.

[57] *Introduction to the Study of the Law of the Constitution*, 8th ed., xxxii.

[58] P. 331.

[59] *British Rule and Jurisdiction beyond the Seas*, 11, 12.

[60] *The Government of the British Empire*, 66-67.

[61] 49 & 50 Vict., c. 33, s. 9.

[62] 1 & 2 Geo. 5, c. 46, ss. 25 and 26.

[63] It had not been exercised during the War. Mr. Jenks has pointed out that what little imperial control Great Britain then

attempted was through the royal prerogative, not through Acts of Parliament. *Cambridge Law Journal*, III, No. 1, p. 19.

[64] *Canadian Constitutional Studies*, 71-72.

[65] *The Canadian Constitution in Form and in Fact*, 22-23.

[66] Imperial Conference, 1926, *Summary of Proceedings*, Cmd. 2768, pp. 13-20. For an analysis of the Report of the Inter-Imperial Relations Committee and a commentary thereupon, see Manfred Nathan, *Empire Government*, 79-104.

[67] 28 & 29 Vict., c. 63, s. 2.

[68] *Journal of the Parliaments of the Empire*, VIII, 591.

[69] *Ibid.*, 619.

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